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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 69

WALTER E. PEARSON, STATE TREASURER OF THE STATE OF OREGON, PETITIONER,

vs.

RUTH HAYES McGRAW AND EDMUND HAYES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWARD STEPHEN HAYES, DECEASED, AND AS INDIVIDUALS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

PETITION FOR CERTIORARI FILED MAY 26, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 69

WALTER E. PEARSON, STATE TREASURER OF THE STATE OF OREGON, PETITIONER,

vs.

RUTH HAYES McGRAW AND EDMUND HAYES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWARD STEPHEN HAYES, DECEASED, AND AS INDIVIDUALS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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Be It Remembered That Heretofore on Thursday the 24th day of March A. D. 1938, the same being the 16th judicial day of the Circuit Court of the State of Oregon, for the County of Multnomah, Department of Probate, there was rendered and entered in said Court and filed in the office of the Clerk of said Court an Order Sustaining Objections of State Treasurer to Order Determining Inheritance Tax, and Re-Determining Inheritance Tax in words and figures as follows, to-wit:

Book 197, page 132.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

In Probate

No. 39937

In the Matter of the Estate of EDWARD STEPHEN HAYES, Deceased

ORDER SUSTAINING OBJECTIONS OF STATE TREASURER TO ORDER DETERMINING INHERITANCE TAX, AND RE-DETERMINING INHERITANCE TAX

On or about February 19, 1937, this Court made an order determining inheritance tax in the above entitled estate, determining a total inheritance tax due to the State of Oregon in the sum of $60,325.18. Thereafter and within the time allowed by law Rufus C. Holman, State Treasurer, filed his objections to said order upon the ground—

(a) That said order was erroneous in that it failed to include as a part of the gross estate of decedent subject to tax property of the value of $450,000, transferred by decedent to Harris Trust and Savings Bank by agreement dated August 15, 1935.

Thereafter the State Treasurer filed his amended objections to said order determining tax upon the ground as stated in said paragraph (a) next preceding, and upon the further ground that the distributive share of Donald Hayes McGraw, the adopted son of Ruth Hayes McGraw, daughter of decedent, was subject to inheritance tax according to the

rates prescribed by paragraph 3 in Chapter 199, Oregon Laws, 1933, as for legacies passing to persons of no relation to the deceased.

Thereafter Edmund Hayes and Ruth Hayes McGraw, as executors of the will of the above named decedent, and as individuals, filed their answer to said objections and their answer to said amended objections.

Thereafter the matter was submitted to this Court upon stipulated facts and upon written briefs filed by attorneys of record for the State Treasurer and for Ruth Hayes McGraw and Edmund Hayes as such executors and as individuals.

The Court being advised in the premises, it is hereby

Ordered, Adjudged and Decreed as follows:

1. The objections of the State Treasurer to the previous determination of inheritance tax in said estate are sustained upon all of the grounds alleged in said amended objections.

2. The transfer by decedent of forty-five Federal Reserve notes of the denomination of $10,000 each, pursuant to agreement dated August 15, 1935, between decedent and Harris Trust and Savings Bank, was a transfer of property within the jurisdiction of the State of Oregon and was subject to inheritance tax by the State of Oregon, as a distribution and division of said decedent's estate made in contemplation of his death.

3. Donald Hayes McGraw, adopted son of decedent's daughter, Ruth Hayes McGraw, is not a lineal descendant of said decedent within the meaning of the classification in the first paragraph of Section 10-603, Oregon Code 1930, as amended by Chapter 199 of the Oregon Laws of 1933, and the distributive share of said Donald Hayes McGraw is subject to the additional rates of tax provided in said Section 10-603 as so amended on transfers to persons of no relationship to the decedent.

4. The gross estate of decedent subject to tax is $1,087,196.52. The amount of allowable deductions is the sum of $44,761.38. The net estate of decedent subject to tax is $1,042,435.14.

5. The shares of beneficiaries and distributees of said net estate are as follows:

E

Beneficiary of Distributee	Relationship to Decedent	Share
Miriam Pierce Hayes	Widow	$135,364.80
Edward Sparrow	Nephew	5,000.00
Hayes Sparrow	Nephew	5,000.00
Margaret C. Hayes	Sister-in-law	5,000.00
Addison Hayes	Nephew	5,000.00
Sue Catherine Hayes	Niece	5,000.00
Gertrude Hollister	Cousin	3,000.00
Katherine Bullen	Cousin	3,000.00
Etta Pedersen	None	1,000.00
Ed Butterfield	None	1,000.00
Ruth Hayes McGraw	Daughter	115,305.33
Don McGraw	Son-in-law	86,735.90
Edmund Hayes	Son	118,915.44
Anna Wheeler Hayes	Daughter-in-law	140,635.73
Donald Hayes McGraw	Adopted son of daughter	46,998.80
Edmund Hayes, Jr.	Grandson	91,369.78
Frederick Wheeler Hayes	Grandson	91,369.78
Philip Schuyler Hayes	Grandson	91,369.78
Cornelia Ingram Hayes	Granddaughter	91,369.79
Total net estate		$1,042,435.14

6. The inheritance tax on said net estate of $1,042,435.14 is the sum of $81,291.57.

7. The additional or collateral inheritance taxes on shares of beneficiaries is as follows:

Edward Sparrow	$60.00
Hayes Sparrow	60.00
Margaret C. Hayes	340.00
Addison Hayes	60.00
Sue Catherine Hayes	60.00
Gertrude Hollister	20.00
Katherine Bullen	20.00
Etta Pedersen	20.00
Ed Butterfield	20.00
Don McGraw	17,273.98
Anna Wheeler Hayes	30,748.98
Donald Hayes McGraw	7,489.76
Total	$56,172.67

8. The total inheritance taxes due to the State of Oregon, including said taxes upon said net estate and said additional or collateral taxes, is the sum of $137,464.24.

9. The executors are hereby authorized and directed to pay to the State Treasurer of the State of Oregon said sum of $137,464.24, subject to credit on account of payments heretofore made by the executors to the State Treasurer on account of inheritance taxes upon said estate, together with interest on the balance unpaid on account of said tax, at the rate of 6 per cent per annum from October 11, 1936.

Dated March 24, 1938.

George Tazwell, Circuit Judge in Probate.

And Afterward on the 28th day of March 1938 there was filed in said Court a Notice of Appeal in words and figures as follows, to-wit:

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

In Probate

No. 39937

In the Matter of the Estate of EDWARD STEPHEN HAYES, Deceased

NOTICE OF APPEAL

To Rufus C. Holman, State Treasurer of the State of Oregon, and Dean H. Dickenson, His Attorney of Record:

Each of you is hereby notified that Ruth Hayes McGraw and Edmund Hayes, as executors of the estate of Edward Stephen Hayes, deceased, and in their individual capacities as persons entitled to distributive shares of the estate of decedent, desire to and do hereby appeal to the Supreme Court of the State of Oregon from the order of the above entitled court bearing date and entered of record on March 24, 1938, in the above entitled matter, in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, sustaining objections of the State Treasurer to order determining inheritance tax and redetermining in-

heritance tax payable to the State of Oregon by said estate, and adjudging and decreeing that there is inheritance tax due to the State of Oregon in the sum of $137,464.24, subject to credit on account of payments heretofore made by the executors to the State Treasurer on account of inheritance taxes upon said estate, together with interest on the balance unpaid on account of said tax at the rate of 6 per cent per annum from October 11, 1936, and from the whole of said order and each and every part thereof.

Charles E. McCulloch, Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Ruth Hayes McGraw and Edmund Hayes, as Executors and as Individuals.

Due and legal service of the within Notice of Appeal is hereby admitted at Portland, Oregon, this 26th day of March, 1938.

Dean H. Dickinson, of Attorneys for Respondent.

And Afterward on the 28th day of March 1938 there was filed in said Court an Undertaking on Appeal in words and figures as follows, to-wit:

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

In Probate

No. 39937

In the Matter of the Estate of EDWARD STEPHEN HAYES, Deceased

UNDERTAKING ON APPEAL

Whereas Ruth Hayes McGraw and Edmund Hayes, as executors of the estate of Edward Stephen Hayes, deceased, and as individuals, have appealed to the Supreme Court of the State of Oregon from that certain order made and entered herein by the above entitled court on the 24th day of March, 1938, sustaining objections of the State Treasurer to order determining inheritance tax and redetermining inheritance tax, and ordering and adjudging that there is due and payable to the State of Oregon upon property of said estate inheritance tax in the sum of $137,464.24, subject to credit on account of payments heretofore made by the executors to the State Treasurer on account of inheritance

taxes upon said estate, together with interest on the balance unpaid on account of said tax at the rate of 6 per cent per annum from October 11, 1936,

Now, Therefore, in consideration of the premises, we, the undersigned, Ruth Hayes McGraw and Edmund Hayes, as executors of the estate of Edward Stephen Hayes, deceased, and as individuals, as principals, and American Surety Company, of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York and duly qualified to act in the State of Oregon as surety, *as surety*, do hereby jointly and severally undertake and promise on the part of said appellants that said appellants will pay all damages, costs and disbursements which may be awarded against said appellants on said appeal.

Dated this 28th day of March, 1938.

Ruth Hayes McGraw and Edmund Hayes, as Executors of the Estate of Edward Stephen Hayes, and as Individuals, by Charles E. McCulloch, Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Their Attorneys. American Surety Company of New York, by W. A. King, Resident Vice President. Attest: E. Murray, Resident Asst. Secretary. W. A. King, Resident Agent. (Corporate Seal.)

Due and legal service of the within Undertaking on Appeal is hereby admitted at Portland, Oregon, this 28th day of March, 1938.

Dean H. Dickinson, of Attorneys for Respondent.

STATE OF OREGON,
County of Multnomah, ss:

I, A. A. Bailey, County Clerk and Ex-Officio Clerk of the Circuit Court of the State of Oregon in and for the County of Multnomah, Department of Probate, do hereby certify that the foregoing copy of Order sustaining objections of State Treasurer to Order Determining Inheritance Tax, and Re-Determining Inheritance Tax, Notice of Appeal and proof of service and Undertaking on Appeal and proof of service, have been by me compared with the originals and that they are true and correct transcripts therefrom and from the whole of such originals as the same appear of record and on file in my office and in my care and custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 8th day of April A. D. 1938.

A. A. Bailey, County Clerk, by (Sgd.) E. L. Ferguson, Deputy. (Seal.)

[fols. 1-15] [File endorsement omitted]

[fol. 16] **IN SUPREME COURT OF OREGON**

MARCH TERM, 1938

In the Matter of the Estate of EDWARD STEPHEN HAYES, Deceased

RUTH HAYES McGRAW and EDMUND HAYES, as Executors of the Last Will and Testament of Edward Stephen Hayes, Deceased, and as Individuals, Appellants,

vs.

RUFUS C. HOLMAN, State Treasurer of the State of Oregon, Respondent

Appeal from a Decree of the Circuit Court for Multnomah County

Hon. George Tazwell, Judge

Appellants' Abstract of Record—Filed April 20, 1938

On or about March 4, 1936, the Circuit Court of the State of Oregon for the County of Multnomah, In Probate, made [fol. 17] and entered its order admitting to probate as the last will and testament of the above named decedent the following:

LAST WILL AND TESTAMENT

I, Edward Stephen Hayes, a resident of Multnomah County, Oregon, do hereby make, publish and declare this my last will and testament, hereby revoking all former wills made by me.

Article I

I direct the payment by my executors out of my estate of all of my just debts allowed in the course of administration, the expenses of my last illness and funeral and the expenses of administration of my estate.

Article II

I hereby declare that all the furniture, furnishings, household goods, books, pictures, and other like contents of the

place of abode of myself and my wife, Miriam Pierce Hayes, are the sole property of my wife.

[fol. 18] Article III

All of my property of every nature which shall be owned by me at the time of my death, I give, devise and bequeath to my wife, Miriam Pierce Hayes, and if she shall not survive me, then to my daughter, Ruth Hayes McGraw, and my son, Edmund Hayes, equally.

Article IV

I hereby nominate and appoint my daughter, Ruth Hayes McGraw, and my son, Edmund Hayes, as the executors of this my last will and testament, with full power to said executors to sell, convey, lease, or mortgage any and all real estate which I may own at the time of my death or which may be acquired by my estate, without license or leave of court, and I direct that they and each of them shall serve in that capacity without bond or other undertaking. If either of my executors herein named shall be unwilling or unable to serve in that capacity, then the other of the two executors herein named shall act as sole [fol. 19] executor without bond with all the powers herein granted to my executors.

In Witness Whereof, I have hereunto set my hand and seal to this my last will and testament this 25 day of September, 1935.

Edward Stephen Hayes. (Seal.)

This instrument, co sting of two typewritten pages, each bearing the signature of the above named Edward Stephen Hayes, was by him on the date thereof signed, published and declared by him to be his last will and testament in our presence, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Lola R. Smith, Residing at Portland, Oregon; Fletcher Rockwood, Residing at Portland, Oregon.

and ordering that letters testamentary issue to appellants.

[fol. 20] Thereafter and on or about February 19, 1937, appellants filed in said Circuit Court a

PETITION FOR ORDER DETERMINING INHERITANCE TAX

reading, with caption and title and verification omitted, as follows:

Your petitioner, one of the duly appointed, qualified and acting executors of the estate of the above named decedent, represents and shows to the Court as follows:

1. The decedent died testate on February 11, 1936, a resident of Multnomah County, Oregon.

2. At the date of his death decedent owned personal property, taxable as part of his gross estate, of the value of $28,228.91, as shown by and included in the inventory and appraisement heretofore filed.

3. On or about September 19, 1935, decedent transferred [fol. 21] to Harris Trust and Savings Bank, a corporation, of Chicago, Illinois, certain property to hold as Trustee under the terms of an agreement dated September 19, 1935, between decedent and said Trustee. A true and correct copy of said agreement is hereto attached, marked Exhibit "A," and by this reference made a part hereof. The said trust as created by said agreement of September 19, 1935, was in effect on the date of decedent's death.

4. The value of the property held by the Trustee on the date of the decedent's death was $608,967.61, as is shown by the inventory and appraisement of said assets heretofore filed.

5. The gross value of property of decedent subject to inheritance tax is

Value of property included in inventory and appraisement	$28,228.91
Value of property held in trust as herein set forth	608,967.61
Total	$637,196.52

6. The deductions which are to be made to determine the net taxable estate are as follows:

[fol. 22]

Liens and General Claims:		
L. R. Smith, services as secretary, Feb. 1 to 11, 1936		$ 52.50
Taxes (State Income and Intangibles):		
Oregon intangibles tax, 1935		90.78
Taxes, Federal:		
Federal income tax, 1935	$ 15.47	
Federal gift tax, 1935	34,800.00	
Total		$34,815.47
Court Costs:		
Clerk's fees	$ 12.00	
Appraisers' fees	930.00	
Notice to creditors	4.00	
Notice final account (estimated)	4.00	
Total		$ 950.00
Attorneys' Fees (estimated)		$ 7,500.00
Last Illness:		
Portland Clinic, professional services	$ 6.00	
Marie L. Schaffer, nurse	76.50	
Total		$ 82.50
Funeral Charges:		
First Congregational Church, Eau Claire, Wisconsin	$ 15.00	
Holman & Lutz, Funeral Directors, Portland, Oregon	$ 575.57	
Dr. J. Hudson Ballard, minister, Portland, Oregon	25.00	
Lanmark & Sons, Funeral Directors, Eau Claire, Wisconsin	71.00	
Railroad fares, Portland to Eau Claire, for body of decedent, and for Mr. and Mrs. Edmund Hayes accompanying	308.77	
Expenses Mr. and Mrs. Edmund Hayes, Portland to Eau Claire	204.00	
Burkhardt Florists, Portland, Ore	24.00	
Telegrams	35.04	
Postage	5.00	
Sanding driveway for funeral, Portland, Oregon	6.75	
Total		$ 1,270.13
Total Deductions		$44,761.38

[fol. 23] 7. The net estate subject to tax is as follows:

Gross estate (paragraph 5)	$637,196.52
Deductions (paragraph 6)	44,761.38
Net Estate	$592,435.14

8. The shares of legatees, beneficiaries and distributees in said net estate subject to tax are as follows:

Name	Relationship	Value of Share
Miriam Pierce Hayes	Widow	$131,063.10
Edward Sparrow	Nephew	5,000.00
Hayes Sparrow	Nephew	5,000.00
Margaret C. Hayes	Sister-in-law	5,000.00
Addison Hayes	Nephew	5,000.00
Sue Catherine Hayes	Niece	5,000.00
Gertrude Hollister	Cousin	3,000.00
Katherine Bullen	Cousin	3,000.00
Etta Pedersen	None	1,000.00
Ed Butterfield	None	1,000.00
Ruth Hayes McGraw	Daughter	85,829.50
Don McGraw	Son-in-law	49,628.22
Edmund Hayes	Son	63,660.45
Anna Wheeler Hayes	Daughter-in-law	84,164.11
Donald Hayes McGraw	Grandson	15,745.66
Edmund Hayes, Jr.	Grandson	32,336.02
Frederick Wheeler Hayes	Grandson	32,336.02
Philip Schuyler Hayes	Grandson	32,336.03
Cornelia Ingram Hayes	Granddaughter	32,336.03
Total		$592,435.14

9. The tax prescribed by Section 10-603, Oregon Code 1930, as amended by Oregon Laws 1933, Chapter 199, upon said net estate is the sum of $35,018.51.

[fol. 24] 10. The taxes prescribed by said section, as so amended, upon distributive shares of distributees, in addition to said tax on said net estate, are as follows:

Edward Sparrow	$60.00
Hayes Sparrow	60.00
Margaret C. Hayes	340.00
Addison Hayes	60.00
Sue Catherine Hayes	60.00
Gertrude Hollister	20.00
Katherine Bullen	20.00
Etta Pedersen	20.00
Ed Butterfield	20.00
Don McGraw	8,015.64
Anna Wheeler Hayes	16,631.03
Total	$25,306.67

11. The total inheritance tax due is as follows:

On net estate	$35,018.51
Collateral taxes	25,306.67
Total tax	$60,325.18

Wherefore, petitioner prays for an order of the Court fixing and determining the inheritance tax in the sum of $60,325.18, and authorizing and directing the executors to pay said sum, subject to deduction allowed for payment [fol. 25] within eight months of the date of death, to the State Treasurer.

Edmund Hayes, Executor of the Estate of Edward Stephen Hayes, Deceased.

* * * * * * *

EXHIBIT "A" TO PETITION

This Agreement made this 19th day of September, 1935, between Edward Stephen Hayes, of the County of Multnomah, State of Oregon, hereinafter termed the "Settlor," and Harris Trust and Savings Bank, an Illinois corporation, now located in the City of Chicago, Illinois, hereinafter termed the "Trustee,"

Witnesseth:

That the Settlor, in consideration of the agreements and undertakings hereinafter made by the Trustee, does hereby sell, assign, transfer, and set over unto the Trustee, its successors and assigns, that certain personal property, a description of which is set forth in Schedule A hereto at- [fol. 26] tached and hereby made a part hereof, and the Trustee is hereby authorized to and agrees that it will receive and hold said personal property, herein sometimes called the trust estate, and the income therefrom, for the uses and purposes and upon the terms and conditions hereinafter provided, that is to say:

Article One

This agreement and the trust hereby evidenced shall be known and designated as the "Edward Stephen Hayes Trust Number Two, dated September 19, 1935."

Article Two

Distribution Provisions

The trust estate shall be distributed both as to income and principal in the following manner:

2.01. Income to Settlor for Life. The whole of the net income of the trust estate shall be paid to, or upon the order of, the Settlor in convenient instalments as long as he shall live.

[fol. 27] 2.02. Partial Distribution of Principal. Upon the death of the Settlor, the Trustee shall pay from the principal of the trust estate to persons named in this paragraph amounts as follows:

To	Relationship to Settlor	Amount
Edward Sparrow	Nephew	$5,000.00
Hayes Sparrow	Nephew	5,000.00
Margaret C. Hayes	Sister-in-law	5,000.00
Addison Hayes	Nephew	5,000.00
Sue Catherine Hayes	Niece	5,000.00
Gertrude Hollister	Cousin	3,000.00
Katherine Bullen	Cousin	3,000.00
Etta Pedersen	None	1,000.00
Ed Butterfield	None	1,000.00

If any beneficiary named in this paragraph shall not be living at the time of the Settlor's death, the provision in this paragraph for said deceased beneficiary shall lapse and shall be of no effect.

2.03. Income to Settlor's Wife. Upon the death of the Settlor, if Miriam Pierce Hayes, his wife, shall then be living, the net income of the trust estate (after the distribution of principal provided in paragraph 2.02 hereof) shall be paid to or upon the order of the Settlor's wife in con-[fol. 28] venient instalments as long as she shall live.

2.04. Separate Funds for McGraw Family and Hayes Family. Upon the death of the Settlor and of the Settlor's wife, all of the trust property (subject to the provisions for distribution of principal in paragraph 2.02 hereof) shall be divided equally into two separate funds or trusts to be known respectively as the "McGraw Family Fund" and the "Hayes Family Fund" and the two separate funds shall

thereafter be administered by the Trustee in the manner hereinafter set forth.

2.05. McGraw Family Fund. The income from the McGraw Family Fund shall be distributed currently and in equal portions to Ruth Hayes McGraw, the daughter of the Settlor, and to Don McGraw, the husband of Ruth Hayes McGraw. Upon the death of Don McGraw, if Ruth Hayes McGraw shall then be living, all of the income from said McGraw Family Fund shall be distributed to Ruth Hayes [fol. 29] McGraw, and if Ruth Hayes McGraw shall not then be living, the income and principal of the portion of said fund from which Don McGraw has theretofore been receiving the income shall be distributed to the grandchildren of the Settlor in the manner hereinafter stated in this paragraph. Upon the death of Ruth Hayes McGraw, the income and principal of the portion of said fund from which Ruth Hayes McGraw has theretofore been receiving the income shall be distributed equally to the five grandchildren of the Settlor now living, that is to say, Donald Hayes McGraw, the son of Ruth Hayes McGraw, and Edmund Hayes, Jr., Frederick Wheeler Hayes, Philip Schuyler Hayes, and Cornelia Ingram Hayes, the children of Edmund Hayes, and any grandchild and grandchildren of the Settlor who may be born or adopted at any time hereafter, or to the surviving child or children of any deceased grandchild by right of representation. Provided, however, that the portion of the principal to which any grandchild shall be entitled shall [fol. 30] be distributed to said grandchild when said grandchild attains the age of 30 years, the income from said share to be paid to said grandchild in the meantime; and upon distribution to a grandchild of a portion of his or her share of principal, his or her share of income thereafter shall be correspondingly reduced. The share of income or principal to which any child or children of a deceased grandchild shall be entitled by right of representation shall be paid to said child or children of a deceased grandchild upon the same dates that the deceased parent would have been entitled to receive income or principal if living. If any grandchild of the Settlor shall die prior to the time herein fixed for distribution to him or her of his or her share of principal without leaving a child or children surviving him or her, or if such child or children of a deceased grandchild shall die before the time fixed for said distribution of prin-

cipal, the share of such grandchild shall be distributed equally to the remaining grandchildren or to their surviving children by right of representation.

[fol. 31] 2.06. Hayes Family Fund. The income from the Hayes Family Fund shall be distributed currently and in equal portions to Edmund Hayes, the son of the Settlor, and to Anna Wheeler Hayes, the wife of Edmund Hayes. Upon the death of Anna Wheeler Hayes, if Edmund Hayes shall then be living, all of the income from said Hayes Family Fund shall be distributed to Edmund Hayes, and if Edmund Hayes shall not then be living, the income and principal of the portion of said fund from which Anna Wheeler Hayes has theretofore been receiving the income shall be distributed to the children of Edmund Hayes in the manner hereinafter stated in this paragraph. Upon the death of Edmund Hayes, if Anna Wheeler Hayes shall then be living, the income and principal of the Hayes Family Fund shall be distributed as follows: three-quarters of the income to Anna Wheeler Hayes so long as she lives and remains unmarried, and one-quarter of the income and principal to the children of Edmund Hayes in the manner here-[fol. 32] inafter stated in this paragraph. Upon the death of Edmund Hayes, if Anna Wheeler Hayes shall then be living and if she shall thereafter remarry, the income and principal of the Hayes Family Fund shall be distributed as follows: one-quarter of the income to Anna Wheeler Hayes for her lifetime, and three-quarters of the income and principal to the children of Edmund Hayes in the manner hereinafter stated in this paragraph. Distribution of income and principal to the children of Edmund Hayes as provided in this paragraph shall be made as follows: the income and principal of the Hayes Family Fund to which the children of Edmund Hayes shall be entitled shall be distributed equally to the four children of Edmund Hayes now living and any child or children of Edmund Hayes who may be born hereafter, either before or after his death, or to the surviving child or children of any deceased child of Edmund Hayes by right of representation. Provided, however, that the portion of the principal to which any child of Edmund Hayes shall be entitled shall be distributed to said child [fol. 33] when said child attains the age of 30 years, the income from said share to be paid to said child in the meantime, and upon distribution to any child of Edmund Hayes

of a portion of his or her share of the principal, his or her share of the income thereafter shall be correspondingly reduced. The share of income or principal to which any child of a deceased child of Edmund Hayes shall be entitled by right of representation shall be paid to said child or children of a deceased child of Edmund Hayes upon the same dates that the deceased parent would have been entitled to receive income or principal if living. If any child of Edmund Hayes shall die prior to the time herein fixed for distribution to him or her of his or her share of principal, without leaving a child or children surviving him or her, or if such child or children of a deceased child of Edmund Hayes shall die before the time fixed for said distribution of principal, the share of such child of Edmund Hayes shall be distributed equally to the remaining children of Edmund Hayes [fol. 34] or to their surviving children by right of representation.

2.07. Distributions of Income to Minor Beneficiaries. If, during the term of the trust created by this instrument, any beneficiary entitled to receive current distributions of income or principal shall be under the age of 21 years, the Trustee, in the exercise of its discretion, may pay the income or principal which any such minor beneficiary is entitled to receive direct to said minor beneficiary or to a parent of said minor beneficiary for the use of said minor beneficiary and the receipt of the minor beneficiary or of the parent for the distributive share of income or principal of said minor beneficiary shall be a sufficient receipt and voucher for the Trustee, and no parent so receiving income or principal for the use of any such minor beneficiary shall be required to account therefor to the minor beneficiary, or to the Trustee, or to any court, or to any other person.

[fol. 35] 2.08. Undistributed Income. Income accrued to the date of creation of the trust shall be administered and distributed as income when collected by the Trustee. Income collected or accrued but not distributed at the time of the termination of any estate or interest hereunder shall belong and be payable as income to the beneficiary or beneficiaries entitled to the next eventual estate or income.

2.09. Ultimate Term of Trust. Anything hereinbefore contained to the contrary notwithstanding, no part of the principal of the trust estate shall be retained in trust for

more than 21 years after the death of the last survivor of the class composed of beneficiaries herein designated in being at the date hereof, and if, at the expiration of said period, any part of the trust estate shall then be retained in trust, such part shall be paid over forthwith to the person or persons who shall then be receiving the net income in the same proportions in which they shall be receiving such net income.

[fol. 36] 2.10. Power in Trustee to Accumulate Income. Notwithstanding anything herein contained to the contrary, upon and after the death of the Settlor, the Trustee is hereby authorized, in the exercise of its sole and uncontrolled discretion, to withhold the distribution of any part or all of the income from the trust estate or from either of the funds herein provided for, if the Trustee shall determine that income so to be withheld is not reasonably required by the said wife of the Settlor while she is a beneficiary of this trust, or by said beneficiaries of said funds, and any income so withheld by the Trustee shall be added to and become a part of the principal of the trust estate or of the particular fund herein provided for from which said income was derived.

2.11. Definitions. Wherever the words "child," or "children," or "grandchild," or "grandchildren," or words of similar import are used in this agreement, they shall be construed to include persons so related by adoption as though they were related by blood.

[fol. 37]

Article Three

Powers and Duties of the Trustee

In the administration and distribution of the trust estate hereinabove created, the Trustee and beneficiaries hereunder shall be governed and controlled by the following:

3.01. Registration of Investments. The Trustee may cause the investments which may be acquired by it to be registered in its name or in the name of its nominee.

3.02. General Investment Powers. The Trustee, in so far as possible, shall invest and reinvest all funds from time to time available for investment or reinvestment in whatever form of property, real or personal, the Trustee in the exercise of its discretion shall deem proper and for the best in-

terests of the trust estate, without being restricted by any present or future laws governing the investment of trust funds. The Trustee, for any consideration or purpose which it shall deem proper, may sell, exchange, alter, mortgage, [fol. 38] or pledge the investments of the trust estate or any of them; may join in, by deposit, pledge, or otherwise, any plan of reorganization or readjustment of any corporation or use any other means of protecting or dealing with any investments of the trust estate, and, in general, may exercise each and every power or right with respect to the ownership of each investment of the trust estate as individuals generally have and enjoy with respect to their own investments and securities, including the power to deposit securities with any protective committee. The grant herein contained of general investment powers is subject, however, to the condition that the Trustee shall not sell or dispose of or invest or reinvest any part of the principal from time to time included in the trust estate without the written approval of the Settlor during his lifetime, and after the death of the Settlor, the written approval of Miriam Pierce Hayes, the Settlor's wife, during her lifetime. After the death of the Settlor, and the death of the Settlor's wife, no such sale, [fol. 39] disposition or investment shall be made of the principal of the separate funds herein provided for without written approval as follows:

(a) For the McGraw Family Fund, the approval of Ruth Hayes McGraw, if living and not under any legal disability; and if Ruth Hayes McGraw is not living or is under any legal disability, the approval of Don McGraw, if living and not under any legal disability; and if Don McGraw is not living or is under any legal disability, the approval of Edmund Hayes, if living and not under any legal disability; and if Edmund Hayes is not living or is under any legal disability, the approval of Anna Wheeler Hayes, if living and not under any legal disability.

(b) For the Hayes Family Fund, the approval of Edmund Hayes, if living and not under any legal disability; and if Edmund Hayes is not living or is under any legal disability, the approval of Anna Wheeler Hayes, if living and not under any legal disability; and if Anna Wheeler Hayes is not living or is under any legal disability, the approval of [fol. 40] Ruth Hayes McGraw, if living and not under any legal disability; and if Ruth Hayes McGraw is not living or

is under any legal disability, the approval of Don McGraw, if living and not under any legal disability.

And provided further that any person from time to time having the right to approve sales, or dispositions, or investments, may, by an instrument in writing filed with the Trustee (1) waive such right, or (2) delegate such right to any other person, such waiver or delegation to be effective until withdrawn by an instrument in writing filed with the Trustee, or until the right of such person to approve investments shall expire by the terms of this paragraph; and in the event of any such waiver or delegation of right, the Trustee shall not be liable for any action in reliance upon said waiver or delegation unless and until there shall be filed with it a written notice of the death or legal disability of the person who shall have made such waiver or delegation or of the person to whom such right has been delegated. [fol. 41] And provided further that if any person having the right to approve such transactions shall fail to express approval or disapproval of any proposed sale, disposition or investment within a period of twenty (20) days following the mailing to him or her of a written notice setting forth the nature and terms of such proposed sale, disposition or investment, then his or her approval thereof shall not be required. And provided further that the Settlor shall have the right and power to direct the Trustee to make any sale, disposition or investment of property in the trust estate, and the right, to be exercised by written notice filed with the Trustee, to delegate such right and power of direction to any other person, such delegation to be effective until withdrawn by an instrument in writing filed with the Trustee, or until the death of the Settlor; and in the event of such delegation of right, the Trustee shall not be liable for any action in reliance upon said delegation unless and until there shall be filed with it written notice of the death of the Settlor or of the death or legal disability of the person [fol. 42] to whom such right has been delegated. After the death of the Settlor, if Miriam Pierce Hayes, the wife of the Settlor, shall then be living, the said wife of the Settlor shall thereupon have the same rights and powers to direct sales, dispositions and investments, and to delegate such rights as are hereinbefore given to the Settlor. And provided further that after the death of the Settlor and of the said wife of the Settlor, and at any time during the term of

this trust while Ruth Hayes McGraw, Edmund Hayes, or Don McGraw shall have the right to approve sales, dispositions or investments with respect to either or both of said funds, they shall have the right and power to direct the Trustee to make any sale, disposition or investment with respect to the fund to which their power of approval extends. The Trustee shall not be responsible in any way to the beneficiaries of this trust or of either fund for any loss which may be incurred as a result of a sale, disposition or investment made by it in compliance with any such direction.

[fol. 43] 3.03. Real Estate Powers. If at any time any investment of the trust estate or of either of the separate funds hereinabove provided for shall consist of real estate, then, in addition to the powers conferred upon the Trustee in paragraph 3.02 hereof, the Trustee, for any consideration or purpose which it shall deem proper, may lease such real estate in præsenti or in futuro for any term of years which it shall deem proper, although such term of years shall extend beyond the period of this trust, and make alterations of, repairs on, additions to, and/or erect or raze improvements on said real estate. Real estate may be sold in the Trustee's discretion on any terms deemed suitable and sales may be made partly for cash and the balance on credit. Provided, however, that the real estate powers granted to the Trustee in this paragraph are made subject to the same conditions with respect to approval and direction of sales, dispositions and investments as are specifically set forth in paragraph 3.02 hereof, relating to general investment powers.

[fol. 44] 3.04. Issuance of Proxies. If at any time there shall be included in the trust estate or in either of the separate funds herein provided for, any corporate stock or any security or investment having voting rights, the Trustee may issue a proxy or proxies for the exercise of voting rights to any person or corporation; provided that upon the request of the person from time to time having the right to approve investments in the trust estate or in any fund, the Trustee shall issue said proxy or proxies to that person, or to the person or corporation designated by the person having the right to approve investments. The Trustee shall be in no way responsible for the manner in which said proxy or proxies are exercised by the person to whom

issued, except in the event of the failure by the Trustee to use reasonable care in the selection of a proxy when such selection is within the discretion of the Trustee.

3.05. Expenses of Administration and Taxes. The Trustee shall pay all costs, charges and expenses of the manage- [fol. 45] ment of the trust estate or the Trustee on account of the trust estate, together with a reasonable compensation to the Trustee for its services hereunder. If the trust estate or any part thereof shall be included in the estate of the Settlor for the purpose of any inheritance, estate, transfer, and/or succession taxes, and a tax levied or assessed thereon, the Trustee shall, unless otherwise provided by an instrument in writing executed by the Settlor with the formalities of a will, pay out of the trust estate that portion of such tax or taxes which the part of the trust estate so taxed, less any exemption allowed by law on account of the character thereof, bears to the total estate so taxed. All income taxes which may be assessed on or against the trust estate by reason of any profit derived from the sale of securities or by reason of stock dividends declared on any shares of stock which may constitute a part of the trust estate, shall be paid therefrom. Provided, however, that if any taxes or expenses of the nature referred to in this paragraph shall relate or be properly chargeable [fol. 46] to one of the separate funds hereinabove provided for, such expenses or taxes shall be paid out of and become a charge upon the separate fund to which such taxes or expenses relate, and in the event that such expenses or taxes relate to both of said separate funds, they shall be distributed by the Trustee and be borne by the separate funds in proportions determined by the Trustee to be equitable.

3.06. Consolidation with Other Trusts. The Trustee, in the exercise of its sole discretion, and if it can do so conveniently, shall have the right and power to consolidate this trust estate or either of the separate funds hereinabove provided with a trust estate or a separate fund established by the Settlor or by Miriam Pierce Hayes, the wife of the Settlor, by any instrument executed by either the Settlor or Miriam Pierce Hayes in his or her lifetime, or by the last will of the Settlor or Miriam Pierce Hayes, if, under the terms of the will or agreement establishing such other fund [fol. 47] or funds, the rights of beneficiaries thereunder are

identical with the rights of beneficiaries under the terms of this agreement, and if the trustee therein named is the same trustee as that which from time to time administers the trust hereby created or shall be changed so that the trustee of such other trust shall be the same as the trustee which shall from time to time administer the trust created by this instrument.

3.07. Separation of Funds. In the administration of any particular fund created by the terms of this agreement, the Trustee shall not be required to make any actual division of said fund pursuant to any provision of this agreement except in so far as may be necessary on a whole or partial distribution of said fund, but in its discretion may hold and administer and invest the several parts of said fund as one or more common funds and may assign undivided interests in said fund to the several parts and divide the net income therefrom among the beneficiaries proportion- [fol. 48] ately. Provided, however, that there shall be no commingling by the Trustee of one of the funds provided for in Article Two hereof with the other of the funds provided for in said Article, but said funds shall be segregated and administered as separate trusts.

3.08. Liability of Third Party. No purchaser at any sale made by the Trustee hereunder or any person dealing with it shall be obliged to see to the application of any money or property paid or delivered to the Trustee.

3.09. Power to Determine Income and Principal. The Trustee is hereby vested with full right, power and authority to determine the manner in which expenses are to be borne and the manner in which receipts are to be credited as between principal and income, and also to determine what shall be "income" and "net income." The Trustee is authorized, in its sole discretion, to charge all premiums on investments forthwith against principal and to credit [fol. 49] all discounts thereon to principal, instead of against or to income.

3.10. Payments and Distributions. All payments of income and/or distributions of principal to the several beneficiaries of the trust estate, as and when such payments or distributions become due, shall be made to such beneficiaries in person or upon their personal receipts (except in case of beneficiaries who shall not have attained their ma-

jorities or who shall be under other legal disability, in which case such payments or distributions may be made in the manner permitted by paragraph 2.07 of Article Two hereof, or to the guardian of the estate of a person under any legal disability), and shall not be grantable, transferable, or otherwise assignable in anticipation thereof in whole or in part by the voluntary or involuntary acts of any such beneficiaries or by operation of law, and shall not be liable or taken for any obligation of such beneficiaries, including alimony. Distributions of the trust estate may be made in [fol. 50] investments and/or cash and in such proportions thereof as the Trustee shall determine to be most equitable, but if the Trustee is able to determine a fair market value, investments shall be distributed at their fair market value, otherwise at such value as the Trustee shall determine. For the purpose of determining such value or fair market value, as the case may be, the Trustee may rely upon whatever information it may deem pertinent without any restriction or requirement whatever.

3.11. Decision of Trustee Final. In each case where discretionary power is vested in the Trustee hereunder, the exercise thereof shall be final and conclusive and binding upon all beneficiaries hereunder and upon all persons whomsoever.

3.12. Powers Granted Not Exclusive. The powers enumerated above are not intended and shall not be construed in any respect as in limitation of any authority given or conferred upon the Trustee by law, but are intended and shall be construed as in addition thereto.

[fol. 51] Article Four

4.01. Resignation or Removal of Trustee. If the taxes assessed against the trust estate, in the opinion of the original Trustee, shall become burdensome, then the Trustee, by written instrument, may appoint a successor trustee hereunder upon giving thirty (30) days' notice to each beneficiary addressed to his or her last known post office address. During the lifetime of the Settlor, he shall be considered as the only beneficiary for the purposes of this paragraph; and after the death of the Settlor, Miriam Pierce Hayes, the wife of the Settlor, if she shall be living, shall be considered as the only beneficiary for the purposes of this paragraph;

and after the death of the Settlor and the said wife of the Settlor, a person under no legal disability, who, at the time any such action is contemplated, is receiving income from the trust estate or would be entitled to distribution of the trust estate or a portion thereof if the date or all dates fixed [fol. 52] for the distribution of the trust estate had arrived, shall be deemed a beneficiary within the meaning of this paragraph. Each trustee appointed by the original Trustee and not removed by the beneficiaries as hereinafter permitted, may be removed by the original Trustee by written instrument. The original Trustee at any time may reappoint itself as Trustee unless the successor shall have been appointed by the beneficiaries. The acting trustee may resign as such upon mailing of thirty (30) days' written notice to the original Trustee, if such trustee for the time being shall have been appointed by the original Trustee; or to each beneficiary hereunder, if such resigning trustee shall be the original Trustee or a trustee which shall have been appointed by the beneficiaries as hereinafter permitted. The beneficiaries, or a majority thereof, as determined by beneficial interests, at any time and from time to time may fill a vacancy in the office of trustee by instrument in writing duly subscribed and acknowledged by them, and at any time may remove the trustee for the time being hereunder [fol. 53] and fill the vacancy caused by such removal. Each trustee appointed in accordance with any of the provisions of this paragraph must be a corporation or banking association having its principal place of business in the United States of America, have an aggregate unimpaired capital, surplus and undivided profits of at least one million dollars ($1,000,000) and must have been engaged actively in the administration of trusts for a period of at least ten (10) years, or must include by consolidation, merger or succession, a corporation or association which has been so engaged in trust business for such period. Each successor trustee shall have, exercise and enjoy all the rights, powers, privileges, obligations and duties, both discretionary and ministerial, herein and hereby given and granted unto the original Trustee; provided, however, that such successor trustee may delegate any and all powers, discretionary and ministerial, in respect of the administration of the trust estate, to the original Trustee, as the former's agent. In case of such delegation of powers, the successor trustee [fol. 54] shall not be liable or responsible for any act or

omission of the original Trustee as the successor's agent. The original Trustee as such agent shall be solely responsible for its own acts. A reasonable compensation shall be paid to the original Trustee for its services as such agent, provided, however, that the aggregate compensation of the successor trustee and the original Trustee shall not exceed (1) the compensation which the original Trustee would charge for administering this trust if it were then trustee, or (2) the compensation which the trustee for the time being would charge if it were trustee and did not employ the original Trustee as its agent, whichever is the greater. Each resigning or removed trustee, upon the appointment of its successor, shall immediately vest in such successor, by appropriate instruments, title to the trust estate. Each successor trustee shall not be required to examine the accounts, records and acts of the previous trustee, but may accept the final accounting of any prior trustee as conclusive of the [fol. 55] amount, nature and allocation of the respective assets of the trust estate, unless a beneficiary shall call attention to any discrepancy in the accounts or to improper acts of the prior trustee, in which case the successor trustee shall take such action in respect thereof as in its sole judgment it shall deem proper.

Article Five

5.01. The Settlor reserves to himself the right, to be exercised by written notice to the trustee, to revoke the trust hereby evidenced in whole or in part, and to alter, amend, change or modify the terms hereof. The Settlor or any beneficiary may add to the property included in the trust estate or in any separate fund and upon delivery of such additional property to and acceptance thereof by the Trustee, such additional property shall thereupon be impressed with this trust and shall thereafter be held by the Trustee for the uses and purposes herein set forth with respect to the original trust estate. Provided, however, that upon revocation by the Settlor, the Trustee shall first be paid its [fol. 56] reasonable compensation to the date of such revocation, and that upon modification of the trust agreement, the duties and liabilities of the Trustee shall not be substantially changed without its consent. Upon revocation by the Settlor, in whole or in part, the trust estate, or the part thereof affected by such revocation, including accrued

or collected but undistributed income, shall thereupon be distributed to the Settlor.

In Witness Whereof, the Settlor has hereunto set his hand and seal and Harris Trust and Savings Bank, to evidence its acceptance of the trusts hereby created, has caused these presents to be signed in triplicate by its duly authorized officer, the day and year in this agreement first above written.

Edward Stephen Hayes. (Seal.) Harris Trust and Savings Bank, by Lynn Lloyd, Assistant Vice President.

Attest: M. Q. Lytle, Assistant Secretary. (Seal.)

TSK.

[fol. 57] Schedule A

Schedule A of the original trust agreement contains a list of bonds and coupons of the par value of $295,359.20.

Schedule A of the original trust agreement likewise includes a detailed description of stocks, as follows:

Shares	
84	Canadian Anthracite Coal Company
126	Forest Lumber Company
2	Guardian Life Insurance Company
26	R. J. Hurley Lumber Company
259	Louisiana Central Lumber Company
25	Louisiana Long Leaf Lumber Company
2760	Weyerhaeuser Timber Company
13	Yards Securities Company
27	American Telephone and Telegraph Company
116	General Motors Corporation
16	Harris Trust and Savings Bank
4	Harris Safe Deposit Company
100	Standard Oil Company of New Jersey
47	Southern Pacific Company
28	Wisconsin Bank Shares Corporation
5	Mission Corporation
2	American Immigration Company
46	Central Lumber & Coal Company
9	Chicago Lumber & Coal Company
2	Eau Claire Country Club
50	Eau Claire Hotel Company

Shares	
221	Fullerton Mineral Company
221	Gulf Lumber Company
131	Louisiana Sawmill Company
14	McDonough Manufacturing Company
141	New Dells Lumber Company
62	Union Mortgage Loan Company
11	Union Holding Company
20	White-Grandin Lumber Company
15.1125	O. H. Ingram Company

[fol. 58] Schedule A attached to the original trust agreement includes also $5,000 Eau Claire Hotel Company second mortgage note.

Thereafter and on or about February 19, 1937, the said Circuit Court made and entered an

ORDER DETERMINING INHERITANCE TAX

reading, with caption and title omitted, as follows:

One of the executors of the estate of the above named decedent having filed his petition for an order determining inheritance tax, and it appearing to the Court that,

1. Decedent died testate on February 11, 1936, a resident of Multnomah County, Oregon.

2. At the date of his death decedent owned personal property, taxable as part of his gross estate, of the value of $28,228.91, as shown by and included in the inventory and appraisement heretofore filed.

3. At the date of death of the decedent, Harris Trust [fol. 59] and Savings Bank, a corporation, of Chicago, Illinois, as Trustee, held certain personal property under the terms of a trust agreement dated September 19, 1935, between decedent and said Trustee. A copy of said trust agreement is attached to and made a part of said petition by the executors. Said agreement was in effect on the date of decedent's death. The property so held by the Trustee on the date of decedent's death was as set forth in said petition and was of a value of $608,967.61, as shown by inventory and appraisement thereof heretofore filed.

4. The gross value of property of decedent subject to inheritance tax is:

Value of property included in inventory and appraisement	$28,228.91
Value of property held in trust	608,967.61
Total	$637,196.52

5. The deductions which should be made to determine the net taxable estate total $43,861.38, as set forth in detail in paragraph 6 of said petition.

[fol. 60] 6. The net estate subject to tax is as follows:

Gross estate	$637,196.52
Deductions	44,761.38
Net Estate	$592,435.14

7. The shares of legatees, beneficiaries and distributees in said net estate subject to tax are as follows:

Name	Relationship	Value of Share
Miriam Pierce Hayes	Widow	$131,063.10
Edward Sparrow	Nephew	5,000.00
Hayes Sparrow	Nephew	5,000.00
Margaret C. Hayes	Sister-in-law	5,000.00
Addison Hayes	Nephew	5,000.00
Sue Catherine Hayes	Niece	5,000.00
Gertrude Hollister	Cousin	3,000.00
Katherine Bullen	Cousin	3,000.00
Etta Pedersen	None	1,000.00
Ed Butterfield	None	1,000.00
Ruth Hayes McGraw	Daughter	85,829.50
Don McGraw	Son-in-law	49,628.22
Edmund Hayes	Son	63,660.45
Anna Wheeler Hayes	Daughter-in-law	84,164.11
Donald Hayes McGraw	Grandson	15,745.66
Edmund Hayes, Jr.	Grandson	32,336.02
Frederick Wheeler Hayes	Grandson	32,336.02
Philip Schuyler Hayes	Grandson	32,336.03
Cornelia Ingram Hayes	Granddaughter	32,336.03
Total		$592,435.14

8. The tax prescribed by Section 10-603, Oregon Code 1930, as amended by Oregon Laws 1933, Chapter 199, upon said net estate is the sum of $35,018.51.

[fol. 61] 9. The taxes prescribed by said section, as so amended, upon distributive shares of distributees, in addition to said tax on said net estate, are as follows:

Edward Sparrow	$60.00
Hayes Sparrow	60.00
Margaret C. Hayes	340.00
Addison Hayes	60.00
Sue Catherine Hayes	60.00
Gertrude Hollister	20.00
Katherine Bullen	20.00
Etta Pedersen	20.00
Ed Butterfield	20.00
Don McGraw	8,015.64
Anna Wheeler Hayes	16,631.03
Total	$25,306.67

10. The total inheritance tax due is as follows:

On net estate	$35,018.51
Collateral taxes	25,306.67
Total	$60,325.18

And the Court being fully advised in the premises, it is hereby

Ordered that the inheritance tax prescribed by law, due to the State of Oregon upon the net estate of the decedent, is the sum of $60,325.18, and the executors are hereby au- [fol. 62] thorized and directed to pay said sum, subject to any deductions allowed for payment within eight months from date of death, to the State Treasurer.

Dated February 19, 1937.

George Tazwell, Circuit Judge in Probate.

Thereafter and on or about March 19, 1937, respondent State Treasurer served and filed his

OBJECTIONS OF STATE TREASURER TO DETERMINATION OF INHERITANCE TAX

reading, with caption and title and verification omitted, as follows:

Comes now Rufus C. Holman, State Treasurer, and objects to the determination of Inheritance Tax due to the state of Oregon in the matter of the estate of Edward Stephen Hayes, deceased, as determined in an Order of this court made and entered herein on the 19th day of February,

1937, on the ground that said determination of inheritance tax fails to include or determine any tax in favor of the [fol. 63] state upon the distribution by said deceased of a material portion of his estate by means of a certain trust executed August 15, 1935. The State Treasurer alleges:

I

That said decedent died testate February 11, 1936, and was, at the time of his death, a resident of, and domiciled in the city of Portland, County of Multnomah, and state of Oregon. Decedent was a physician by profession but retired from active practice, and had attained 79 years of age at the time of his death.

II

That until about six months prior to his death, said deceased was the owner of stocks, bonds and other intangible personal property of a value in excess of $1,000,000.00. That on or about the first day of August, 1935, decedent sold a large portion of said bonds and stocks, and on the 15th day of August, 1935, transferred the proceeds thereof, amounting to $450,000.00, to the Harris Trust and Savings [fol. 64] Bank, an Illinois corporation of Chicago, Illinois, in trust, however, to be invested, held and distributed by said Harris Trust and Savings Bank as Trustee for the use of the son and daughter of decedent and their respective spouses and children, according to the terms of a certain irrevocable declaration of trust. A copy of said declaration of trust is hereby attached, marked Exhibit A, and made a part of these Objections.

III

That at the time he transferred said $450,000.00 in trust, decedent was in failing health and suffering from an illness which resulted in his death six months later. That said transfer of property in trust was made and intended by decedent as an advancement and division of his estate in contemplation of his death.

IV

That the transfer by decedent of said $450,000.00 in trust [fol. 65] for his beneficiaries constituted a distribution of decedent's estate in contemplation of his death subject to

inheritance tax of the state of Oregon as a part of his taxable estate. That shortly after the creation of said trust, the funds placed therein by decedent were reinvested by the Trustee in stocks, bonds and other intangibles which at the date of decedent's death had a fair value of not less than $450,000.00. That no portion of the value of the property so transferred by decedent was included in his taxable estate, or considered in fixing inheritance tax thereon; and said Order determining inheritance tax herein does not include or determine any inheritance tax in favor of the state of Oregon on the value of the property so distributed by decedent through said trust.

Wherefore the State Treasurer prays that said Order determining inheritance tax in this estate of date February 19, 1937, to be vacated and set aside. That the court reassess and redetermine inheritance tax of the state of Oregon in said estate by including therein the property em- [fol. 66] braced in said trust at its fair value on February 11, 1936. That the court cause the property of said trust to be appraised or otherwise valued at its fair value as of the date of decedent's death. That the court grant the State Treasurer such other and further relief as may be just and equitable.

R. A. Reid, Deputy Inheritance Tax Auditor.

* * * * * * *

EXHIBIT "A" TO OBJECTIONS

This Agreement made this 15th day of August, 1935, between Edward Stephen Hayes, of the County of Multnomah, State of Oregon, hereinafter termed the "Settlor," and Harris Trust and Savings Bank, an Illinois corporation, now located in the City of Chicago, Illinois, hereinafter termed the "Trustee."

Witnesseth:

That the Settlor, in consideration of the agreements and undertakings hereinafter made by the Trustee, does hereby [fol. 67] sell, assign, transfer, and set over unto the Trustee, its successors and assigns, that certain personal property, a description of which is set forth in Schedule A hereto attached and hereby made a part hereof, and the Trustee is hereby authorized to and agrees that it will receive and hold said personal property, herein sometimes called the

trust estate, and the income therefrom, for the uses and purposes and upon the terms and conditions hereinafter provided, that is to say:

Article One

This agreement and the trust hereby evidenced shall be known and designated as the "Edward Stephen Hayes Trust, Number One, dated August 15th, 1935."

Article Two

Distribution Provisions

The trust estate shall be distributed both as to income and principal in the following manner:

[fol. 68] 2.01. Separate Funds for McGraw Family and Hayes Family. All of the trust property shall be divided equally into two separate funds or trusts to be known respectively as the "McGraw Family Fund" and the "Hayes Family Fund," and the two separate funds shall thereafter be administered by the Trustee in the manner hereinafter set forth.

2.02. McGraw Family Fund. The income from the McGraw Family Fund shall be distributed currently and in equal portions to Ruth Hayes McGraw, the daughter of the Settlor, and to Don McGraw, the husband of Ruth Hayes McGraw. Upon the death of Don McGraw, if Ruth Hayes McGraw shall then be living, all of the income from said McGraw Family Fund shall be distributed to Ruth Hayes McGraw, and if Ruth Hayes McGraw shall not then be living, the income and principal of the portion of said fund from which Don McGraw has theretofore been receiving the income shall be distributed to the grandchildren of the [fol. 69] Settlor in the manner hereinafter stated in this paragraph. Upon the death of Ruth Hayes McGraw, the income and principal of the portion of said fund from which Ruth Hayes McGraw has theretofore been receiving the income shall be distributed equally to the five grandchildren of the Settlor now living, that is to say, Donald Hayes McGraw, the son of Ruth Hayes McGraw, and Edmund Hayes, Jr., Frederick Wheeler Hayes, Philip Schuyler Hayes, and Cornelia Ingram Hayes, the children of Edmund Hayes, and any grandchild and grandchildren of the Settlor who

may be born or adopted at any time hereafter, or to the surviving child or children of any deceased grandchild by right of representation. Provided, however, that the portion of the principal to which any grandchild shall be entitled shall be distributed to said grandchild when said grandchild attains the age of 30 years, the income from said share to be paid to said grandchild in the meantime; and upon distribution to a grandchild of a portion of his or her share of principal, his or her share of income thereafter shall be correspondingly reduced. [fol. 70] The share of income or principal to which any child or children of a deceased grandchild shall be entitled by right of representation shall be paid to said child or children of a deceased grandchild upon the same dates that the deceased parent would have been entitled to receive income or principal if living. If any grandchild of the Settlor shall die prior to the time herein fixed for distribution to him or her of his or her share of principal without leaving a child or children surviving him or her, or if such child or children of a deceased grandchild shall die before the time fixed for said distribution of principal, the share of such grandchild shall be distributed equally to the remaining grandchildren or to their surviving children by right of representation.

2.03. Hayes Family Fund. The income from the Hayes Family Fund shall be distributed currently and in equal portions to Edmund Hayes, the son of the Settlor, and to Anna [fol. 71] Wheeler Hayes, the wife of Edmund Hayes. Upon the death of Anna Wheeler Hayes, if Edmund Hayes shall then be living, all of the income from said Hayes Family Fund shall be distributed to Edmund Hayes, and if Edmund Hayes shall not then be living, the income and principal of the portion of said fund from which Anna Wheeler Hayes has theretofore been receiving the income shall be distributed to the children of Edmund Hayes in the manner hereinafter stated in this paragraph. Upon the death of Edmund Hayes, if Anna Wheeler Hayes shall then be living, the income and principal of the Hayes Family Fund shall be distributed as follows: three-quarters of the income to Anna Wheeler Hayes so long as she lives and remains unmarried, and one-quarter of the income and principal to the children of Edmund Hayes in the manner hereinafter stated in this paragraph. Upon the death of Edmund Hayes, if Anna Wheeler Hayes shall then be living and if she shall

thereafter remarry, the income and principal of the Hayes [fol. 72] Family Fund shall be distributed as follows: one-quarter of the income to Anna Wheeler Hayes for her life-time, and three-quarters of the income and principal to the children of Edmund Hayes in the manner hereinafter stated in this paragraph. Distribution of income and principal to the children of Edmund Hayes as provided in this paragraph shall be made as follows: The income and principal of the Hayes Family Fund to which the children of Edmund Hayes shall be entitled shall be distributed equally to the four children of Edmund Hayes now living and any child or children of Edmund Hayes who may be born hereafter, either before or after his death, or to the surviving child or children of any deceased child of Edmund Hayes by right of representation. Provided, however, that the portion of the principal to which any child of Edmund Hayes shall be entitled shall be distributed to said child when said child attains the age of 30 years, the income from said share to be paid to said child in the meantime, and upon distribution [fol. 73] to any child of Edmund Hayes of a portion of his or her share of the principal, his or her share of the income thereafter shall be correspondingly reduced. The share of income or principal to which any child of a deceased child of Edmund Hayes shall be entitled by right of representation shall be paid to said child or children of a deceased child of Edmund Hayes upon the same dates that the deceased parent would have been entitled to receive income or principal if living. If any child of Edmund Hayes shall die prior to the time herein fixed for distribution to him or her of his or her share of principal, without leaving a child or children surviving him or her, or if such child or children of a deceased child of Edmund Hayes shall die before the time fixed for said distribution of principal, the share of such child of Edmund Hayes shall be distributed equally to the remaining children of Edmund Hayes or to their surviving children by right of representation.

[fol. 74] 2.04. Distributions of Income to Minor Beneficiaries. If, during the term of the trust created by this instrument, any beneficiary entitled to receive current distributions of income or principal shall be under the age of 21 years, the Trustee, in the exercise of its discretion, may pay the income or principal which any such minor beneficiary is

entitled to receive direct to said minor beneficiary or to a parent of said minor beneficiary for the use of said minor beneficiary, and the receipt of the minor beneficiary or of the parent for the distributive share of income or principal of said minor beneficiary shall be a sufficient receipt and voucher for the Trustee, and no parent so receiving income or principal for the use of any such minor beneficiary shall be required to account therefor to the minor beneficiary, or to the Trustee, or to any court, or to any other person.

2.05. Undistributed Income. Income collected or accrued but not distributed at the time of the termination of any [fol. 75] estate or interest hereunder shall belong and be payable as income to the beneficiary or beneficiaries entitled to the next eventual estate or income.

2.06. Ultimate Term of Trust. Anything hereinbefore contained to the contrary notwithstanding, no part of the principal of the trust estate shall be retained in trust for more than 21 years after the death of the last survivor of the class composed of beneficiaries herein designated in being at the date hereof, and if, at the expiration of said period, any part of the trust estate shall then be retained in trust, such part shall be paid over forthwith to the person or persons who shall then be receiving the net income in the same proportions in which they shall be receiving such net income.

2.07. Power in Trustee to Accumulate Income. Notwithstanding anything herein contained to the contrary, the Trustee is hereby authorized, in the exercise of its sole and uncontrolled discretion, to withhold the distribution of any part or all of the income from either of the funds herein [fol. 76] provided for, if the Trustee shall determine that income so to be withheld is not reasonably required by said beneficiaries, and any income so withheld by the Trustee shall be added to and become a part of the principal of the particular fund herein provided for from which said income was derived.

2.08. Definitions. Wherever the words "child," or "children," or "grandchild," or "grandchildren," or words of similar import are used in this agreement, they shall be construed to include persons so related by adoption, as though they were related by blood.

Article Three

Powers and Duties of the Trustee

In the administration and distribution of the trust estate hereinabove created, the Trustee and beneficiaries hereunder shall be governed and controlled by the following:

3.01. Registration of Investments. The Trustee may cause the investments which may be acquired by it to be [fol. 77] registered in its name or in the name of its nominee.

3.02. General Investment Powers. The Trustee, in so far as possible, shall invest and reinvest all funds from time to time available for investment or reinvestment in whatever form of property, real or personal, the Trustee in the exercise of its discretion shall deem proper and for the best interests of the trust estate, without being restricted by any present or future laws governing the investment of trust funds. The Trustee, for any consideration or purpose which it shall deem proper, may sell, exchange, alter, mortgage, or pledge the investments of the trust estate or any of them; may join in, by deposit, pledge, or otherwise, any plan of reorganization or readjustment of any corporation or use any other means of protecting or dealing with any investments of the trust estate, and, in general, may exercise each and every power or right with respect to the ownership of each investment of the trust estate as indi- [fol. 78] viduals generally have and enjoy with respect to their own investments and securities, including the power to deposit securities with any protective committee. The grant herein contained of general investment powers is subject, however, to the condition that the Trustee shall not sell or dispose of or invest or reinvest any part of the principal from time to time included in the trust estate and the separate funds hereby created without written approval as follows:

(a) For the McGraw Family Fund, the approval of Ruth Hayes McGraw, if living and not under any legal disability; and if Ruth Hayes McGraw is not living or is under any legal disability, the approval of Don McGraw, if living and not under any legal disability; and if Don McGraw is not living or is under any legal disability, the approval of Edmund Hayes, if living and not under any legal disability;

and if Edmund Hayes is not living or is under any legal disability, the approval of Anna Wheeler Hayes, if living and not under any legal disability.

[fol. 79] (b) For the Hayes Family Fund, the approval of Edmund Hayes, if living and not under any legal disability; and if Edmund Hayes is not living or is under any legal disability, the approval of Anna Wheeler Hayes, if living and not under any legal disability; and if Anna Wheeler Hayes is not living or is under any legal disability, the approval of Ruth Hayes McGraw, if living and not under any legal disability; and if Ruth Hayes McGraw is not living or is under any legal disability, the approval of Don McGraw, if living and not under any legal disability.

And provided, further, that any person from time to time having the right to approve sales, or dispositions, or investments, may, by an instrument in writing filed with the Trustee (1) waive such right, or (2) delegate such right to any other person, such waiver or delegation to be effective until withdrawn by an instrument in writing filed with the Trustee, or until the right of such person to approve investments shall expire by the terms of this paragraph; and in the event of any such waiver or delegation of right, the [fol. 80] Trustee shall not be liable for any action in reliance upon said waiver or delegation unless and until there shall be filed with it written notice of the death or legal disability of the person who shall have made such waiver or delegation or of the person to whom such right has been delegated. And provided, further, that if any person having the right to approve such transactions shall fail to express approval or disapproval of any proposed sale, disposition or investment within a period of twenty (20) days following the mailing to him or her of a written notice setting forth the nature and terms of such proposed sale, disposition or investment, then his or her approval thereof shall not be required. And provided, further, that at any time during the term of this trust while Ruth Hayes McGraw, Edmund Hayes, or Don McGraw shall have the right to approve sales, dispositions, or investments with respect to one or both of said funds, they shall have the right and power to direct the Trustee to make any sale, disposition or investment with respect to the fund to which their power [fol. 81] of approval extends. The Trustee shall not be re-

sponsible in any way to the beneficiaries of this trust or of either fund for any loss which may be incurred as a result of a sale, disposition or investment made by it in compliance with any such direction.

3.03. Real Estate Powers. If at any time any investment of the trust estate or of either of the separate funds hereinabove provided for shall consist of real estate, then, in addition to the powers conferred upon the Trustee in paragraph 3.02 hereof, the Trustee for any consideration or purpose which it shall deem proper, may lease such real estate in praesenti or in futuro for any term of years which it shall deem proper, although such term of years shall extend beyond the period of this trust, and make alterations of, repairs on, additions to, and/or erect or raze improvements on said real estate. Real estate may be sold in the Trustee's discretion on any terms deemed suitable and sales may be [fol. 82] made partly for cash and the balance on credit. Provided, however, that the real estate powers granted to the Trustee in this paragraph are made subject to the same conditions with respect to approval and direction of sales, dispositions and investments as are specifically set forth in paragraph 3.02 hereof, relating to general investment powers.

3.04. Issuance of Proxies. If at any time there shall be included in the trust estate or in either of the separate funds herein provided for, any corporate stock or any security or investment having voting rights, the Trustee may issue a proxy or proxies for the exercise of voting rights to any person or corporation; provided that upon the request of the person from time to time having the right to approve investments in any fund, the Trustee shall issue said proxy or proxies to that person, or to the person or corporation designated by the person having the right to approve investments. The Trustee shall be in no way responsible for the manner in which said proxy or proxies are exercised by [fol. 83] the person to whom issued, except in the event of the failure by the Trustee to use reasonable care in the selection of a proxy when such selection is within the discretion of the Trustee.

3.05 Expenses of Administration and Taxes. The Trustee shall pay all costs, charges and expense of the management of the trust estate or the Trustee on account of the trust

estate, together with a reasonable compensation to the Trustee for its services hereunder. If the trust estate or any part thereof shall be included in the estate of the Settlor for the purpose of any inheritance, estate, transfer, and/or succession taxes, and a tax levied or assessed thereon, the Trustee shall, unless otherwise provided by an instrument in writing executed by the Settlor with the formalities of a will, pay out of the trust estate that portion of such tax or taxes which the part of the trust estate so taxed, less any exemption allowed by law on account of the character there- [fol. 84] of, bears to the total estate so taxed. All income taxes which may be assessed on or against the trust estate by reason of any profit derived from the sale of securities or by reason of stock dividends declared on any shares of stock which may constitute a part of the trust estate, shall be paid therefrom. Provided, however, that if any taxes or expenses of the nature referred to in this paragraph shall relate or be properly chargeable to one of the separate funds hereinabove provided for, such expenses or taxes shall be paid out of and become a charge upon the separate fund to which such taxes or expenses relate, and in the event that such expenses or taxes relate to both of said separate funds, they shall be distributed by the Trustee and be borne by the separate funds in proportions determined by the Trustee to be equitable.

3.06 Consolidation with other Trusts. The Trustee, in the exercise of its sole discretion, and if it can do so conveniently, shall have the right and power to consolidate this [fol. 85] trust estate or either of the separate funds hereinabove provided with a trust estate or a separate fund established by the Settlor or by Miriam Pierce Hayes, the wife of the Settlor, by any instrument executed by either the Settlor or Miriam Pierce-Hayes in his or her lifetime, or by the last will of the Settlor or Miriam Pierce Hayes, if, under the terms of the will or agreement establishing such other fund or funds, the rights of beneficiaries thereunder are identical with the rights of beneficiaries under the terms of this agreement, and if the trustee therein named is the same trustee as that which from time to time administers the trust hereby created or shall be changed so that the trustee of such other trust shall be the same as the trustee which shall from time to time administer the trust created by this instrument.

3.07. Separation of Funds. In the administration of any particular fund created by the terms of this agreement, the Trustee shall not be required to make any actual division [fol. 86] of said fund pursuant to any provision of this agreement except in so far as may be necessary on a whole or partial distribution of said fund, but in its discretion may hold and administer and invest the several parts of said fund as one or more common funds and may assign undivided interests in said fund to the several parts and divide the net income therefrom among the beneficiaries proportionately. Provided, however, that there shall be no commingling by the Trustee of one of the funds provided for in Article Two hereof with the other of the funds provided for in said Article, but said funds shall be segregated and administered as separate trusts.

3.08. Liability of Third Party. No purchaser at any sale made by the Trustee hereunder or any person dealing with it shall be obliged to see to the application of any money or property paid or delivered to the Trustee.

3.09. Power to Determine Income and Principal. The [fol. 87] Trustee is hereby vested with full right, power and authority to determine the manner in which expenses are to be borne and the manner in which receipts are to be credited as between principal and income, and also to determine what shall be "income" and "net income." The Trustee is authorized, in its sole discretion, to charge all premiums on investments forthwith against principal and to credit all discounts thereon to principal, instead of against or to income.

3.10. Payments and Distributions. All payments of income and/or distributions of principal to the several beneficiaries of the trust estate, as and when such payments or distributions become due, shall be made to such beneficiaries in person or upon their personal receipts (except in case of beneficiaries who shall not have attained their majorities or who shall be under other legal disability, in which case such payments or distributions may be made in the manner permitted by paragraph 2.04 of Article Two hereof, or to [fol. 88] the guardian of the estate of a person under any legal disability), and shall not be grantable, transferable, or otherwise assignable in anticipation thereof in whole or in part by the voluntary or involuntary acts of any such bene-

ficiaries or by operation of law, and shall not be liable or taken for any obligation of such beneficiaries, including alimony. Distributions of the trust estate may be made in investments and/or cash and in such proportions thereof as the Trustee shall determine to be most equitable, but if the Trustee is able to determine a fair market value, investments shall be distributed at their fair market value, otherwise at such value as the Trustee shall determine. For the purpose of determining such value or fair market value, as the case may be, the Trustee may rely upon whatever information it may deem pertinent without any restriction or requirement whatever.

3.11. Decision of Trustee Final. In each case where discretionary power is vested in the Trustee hereunder, the exercise thereof shall be final and conclusive and binding [fol. 89] upon all beneficiaries hereunder and upon all persons whomsoever.

3.12. Powers granted not exclusive. The powers enumerated above are not intended and shall not be construed in any respect as in limitation of any authority given or conferred upon the Trustee by law, but are intended and shall be construed as in addition thereto.

Article Four

4.01. Resignation or Removal of Trustee. If the taxes assessed against the trust estate, in the opinion of the original Trustee, shall become burdensome, then the Trustee, by written instrument, may appoint a successor trustee hereunder upon giving thirty (30) days' notice to each beneficiary addressed to his or her last known post office address. A person under no legal disability, who, at the time any such action is contemplated is receiving income from the trust estate or would be entitled to distribution of the trust estate [fol. 90] or a portion thereof if the date or all dates fixed for the distribution of the trust estate had arrived, shall be deemed a beneficiary within the meaning of this paragraph. Each trustee appointed by the original Trustee and not removed by the beneficiaries as hereinafter permitted, may be removed by the original Trustee by written instrument. The original Trustee at any time may reappoint itself as Trustee unless the successor shall have been appointed by the beneficiaries. The acting trustee may resign as such

upon mailing of thirty (30) days' written notice to the original Trustee, if such trustee for the time being shall have been appointed by the original Trustee; or to each beneficiary hereunder, if such resigning trustee shall be the original Trustee or a trustee which shall have been appointed by the beneficiaries as hereinafter permitted. The beneficiaries, or a majority thereof, as determined by beneficial interests, at any time and from time to time may fill a vacancy in the office of trustee by instrument in writing duly subscribed and acknowledged by them, and at any time may re-
[fol. 91] move the trustee for the time being hereunder and fill the vacancy caused by such removal. Each trustee appointed in accordance with any of the provisions of this paragraph must be a corporation or banking association having its principal place of business in the United States of America, have an aggregate unimpaired capital, surplus and undivided profits of at least one million dollars ($1,000,000) and must have been engaged actively in the administration of trusts for a period of at least ten (10) years, or must include by consolidation, merger, or succession, a corporation or association which has been so engaged in trust business for such period. Each successor trustee shall have, exercise and enjoy all the rights, powers, privileges, obligations and duties, both discretionary and ministerial, herein and hereby given and granted unto the original Trustee; provided, however, that such successor trustee may delegate any and all powers, discretionary and ministerial, in respect of the administration of the trust estate, to the origi-
[fol. 92] nal Trustee, as the former's agent. In case of such delegation of powers, the successor trustee shall not be liable or responsible for any act or omission of the original Trustee as the successor's agent. The original Trustee as such agent shall be solely responsible for its own acts. A reasonable compensation shall be paid to the original Trustee for its services as such agent, provided, however, that the aggregate compensation of the successor trustee and the original Trustee shall not exceed (1) the compensation which the original Trustee would charge for administering this trust if it were then trustee, or (2) the compensation which the trustee for the time being would charge if it were trustee and did not employ the original Trustee as its agent whichever is the greater. Each resigning or removed trustee, upon the appointment of its successor, shall immediately vest in such successor, by appropriate instruments, title t

the trust estate. Each successor trustee shall not be required to examine the accounts, records and acts of the previous trustee, but may accept the final accounting of any [fol. 93] prior trustee as conclusive of the amount, nature and allocation of the respective assets of the trust estate, unless a beneficiary shall call attention to any discrepancy in the accounts or to improper acts of the prior trustee, in which case the successor trustee shall take such action in respect thereof as in its sole judgment it shall deem proper.

Article Five

5.01. This agreement and the trust or trusts hereby created shall be irrevocable.

In Witness Whereof, the Settlor has hereunto set his hand and seal and Harris Trust and Savings Bank to evidence its acceptance of the trusts hereby created, has caused these presents to be signed in triplicate by its duly authorized officer, the day and year in this agreement first above written.

Edward Stephen Hayes, Harris Trust and Savings Bank (Signed by Officers of Harris Trust and Savings Bank.) Its Assistant Vice President. (Seal.)

Attest:

(Signed by Officers of Harris Trust and Savings Bank.) Assistant Secretary.

[fol. 94] Schedule A of Agreement by and Between Edward Stephen Hayes and Harris Trust and Savings Bank for the Creation of "Edward Stephen Hayes Trust, Number One, Dated August 15th, 1935"

All that certain currency now situated in safe deposit box No. 2100, in the vault of Harris Safe Deposit Company, in the City of Chicago, Illinois, more particularly described as follows:

Forty-five (45) Federal Reserve Notes of the denomination of $10,000 each, and numbered from G00000031A to G00000040A, both inclusive, and from G00000126A to G00000160A, both inclusive, of the value of four hundred fifty thousand dollars ($450,000.00).

Thereafter and on or about March 30, 1937, appellants served and filed their

[fol. 95] ANSWER OF EXECUTORS TO OBJECTIONS OF STATE TREASURER TO DETERMINATION OF INHERITANCE TAX

reading, with caption and title and verification omitted, as follows:

Ruth Hayes McGraw and Edmund Hayes, the duly appointed, qualified and acting executors of the will of the above named decedent, make this their answer to the "Objections of State Treasurer to Determination of Inheritance Tax," heretofore filed in the above entitled Court:

I

The executors admit the allegations of paragraph I of said objections, except that they allege that decedent's domicile at the time of his death was in Multnomah County, Oregon, beyond the limits of the City of Portland.

II

Answering paragraph II of said objections, the executors admit that at a time prior to his death decedent was the [fol. 96] owner of stocks, bonds, and other like personal property of a value in excess of $1,000,000; that prior to August 15, 1935, certain of said personal property was sold; that by an agreement dated August 15, 1935, between decedent and Harris Trust and Savings Bank, an Illinois corporation, as trustee, decedent transferred property to said trustee in trust for the purposes set forth in said agreement; and that Exhibit A, attached to said objections, is a true and correct copy of said agreement dated August 15, 1935; but except as so admitted, the executors deny the allegations of said paragraph II. And the executors, on the other hand, allege facts as follows:

Decedent, prior to the time of establishment by him of a domicile in the State of Oregon, was and for over fifty years had been a resident of the City of Eau Claire, in the State of Wisconsin. During the month of September, 1933, decedent moved to Oregon, and established a domicile in Multnomah County, Oregon. For a period of over ten years [fol. 97] prior to August 15, 1935, Harris Trust and Savings Bank, an Illinois corporation, of Chicago, Illinois (herein referred to as "Harris Bank"), had acted as agent of decedent as custodian of bonds owned by decedent, and had acted for decedent as his financial agent in his investments

and reinvestments in bonds. The bonds and securities from time to time owned by decedent and held by said Harris Bank were never physically present or situated within the State of Oregon, but were at all times physically present and situated in Chicago, in the State of Illinois. Prior to August 15, 1935, the decedent directed said Harris Bank, as his agent, to sell a part of the bonds thus held in Chicago and owned by decedent, and directed said Harris Bank to purchase for him Federal Reserve notes. Prior to August 15, 1935, said Harris Bank sold in the open market for decedent's account certain bonds then owned by decedent. Prior to August 15, 1935, with funds then belonging to decedent, said Harris Bank, as decedent's agent, purchased [fol. 98] forty-five (45) Federal Reserve notes of the denomination of $10,000 each, and numbered from G00000031-A, to G00000040A, both inclusive, and from G00000126A to G00000160A, both inclusive, of the value of $450,000, and decedent thereupon became the owner of said Federal Reserve notes. All of said Federal Reserve notes were thereupon and prior to August 15, 1935, placed in a safe deposit box rented by decedent, being box No. 2100, in the vault of Harris Safe Deposit Company, in the City of Chicago, Illinois, and remained in said box from the time they were placed therein continuously until a time subsequent to the transfer thereof by decedent to said Harris Bank, by virtue of said agreement dated August 15, 1935. During the period while said Federal Reserve notes were owned by decedent, none of said Federal Reserve notes was ever in the State of Oregon and, to the best knowledge of the executors, none of said Federal Reserve notes has ever been within the State of Oregon. On August 15, 1935, at which time decedent [fol. 99] was the owner of tangible personal property situated in the State of Illinois, consisting of said forty-five Federal Reserve notes, decedent executed said agreement dated August 15, 1935. Said agreement was executed by said Harris Bank by its duly authorized officers, in Chicago, Illinois, on or before August 17, 1935.

III

Answering paragraph III of said objections, the executors admit that on August 15, 1935, decedent was in failing health and suffering from an illness which resulted in his death on February 11, 1936; and admit that the transfer by virtue

of said agreement dated August 15, 1935, was made by decedent in contemplation of his death, all as alleged in said paragraph III, but except as so admitted the executors deny the allegations of said paragraph III; and the executors allege further that on August 15, 1935, decedent was not aware of the serious nature of his illness or that said illness might result in his death in the relatively near future.

[fol. 100] IV

Answering paragraph IV of said objections, the executors admit that the transfer by said agreement dated August 15, 1935, constituted a transfer by decedent in contemplation of death, that after the creation of said trust the trustee invested the trust property in intangible personal property, that no part of the property transferred by said agreement dated August 15, 1935, was included as part of decedent's taxable estate in the order heretofore made by this Court determining inheritance tax due to the State of Oregon, but except as so admitted the executors deny each and every allegation of said paragraph IV.

V

Further answering said objections, the executors allege as follows:

Prior to and on August 15, 1935, and thereafter, until the execution by said Harris Bank of the agreement described in this paragraph, the decedent owned tangible personal property situated in the State of Illinois, outside of the [fol. 101] State of Oregon, described as follows:

All that certain currency then situated in safe deposit box No. 2100, in the vault of Harris Safe Deposit Company, in the City of Chicago, Illinois, more particularly described as follows:

Forty-five (45) Federal Reserve notes of the denomination of $10,000 each, and numbered from G00000031A to G00000040A, both inclusive, and from G00000126A to G00000160A, both inclusive, of the value of four hundred fifty thousand dollars ($450,000.00).

By an agreement dated August 15, 1935, executed by decedent on August 15, 1935, and by said Harris Bank at Chicago, Illinois on or before August 17, 1935, a true copy o

which is attached to said objections and marked Exhibit A, decedent sold, assigned, transferred and set over to said Harris Bank, as trustee, said tangible personal property then situated in the State of Illinois, hereinbefore described in this paragraph. Upon the execution on or before August [fol. 102] 17, 1935, by said Harris Bank of said agreement dated August 15, 1935, the title to said tangible personal property passed to said Harris Bank as trustee, and thereupon decedent had no right, title or interest in said tangible personal property, and at no time thereafter did decedent have any right, title or interest in said tangible personal property or in any property whatsoever thereafter acquired by the trustee, by the use of said tangible personal property. Decedent never had any right, title or interest in any property acquired by the trustee by the use of said tangible personal property, and said property so acquired by the trustee by the use of said tangible personal property included no property which decedent had previously owned, or in which he had ever had any interest. The said tangible personal property, while owned by decedent, was situated in and was within the jurisdiction of the State of Illinois, and was not situated in or within the jurisdiction of the State of Oregon. Said tangible personal property was not and is not subject [fol. 103] to or within the jurisdiction of the State of Oregon for any purpose, and particularly was not and is not subject to or within the jurisdiction of the State of Oregon for the purpose of determining inheritance tax under the statutes of the State of Oregon upon the property of decedent or upon any transfers by decedent for any purpose during his lifetime. The subjection by the State of Oregon of the estate of the decedent to inheritance tax measured or determined in any way by consideration or inclusion of said tangible personal property so transferred by said agreement dated August 15, 1935, or of any property thereafter acquired by said Harris Bank, as trustee, by use of said tangible personal property, would deprive the executors, and all persons interested in the estate of the decedent in any way, of their property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in contravention of Section 18 of Article I, Section 21 of Article I, and of [fol. 104] Section 32 of Article I, of the Constitution of the State of Oregon.

Wherefore, the executors pray for an order of this Court overruling and denying said objections by the State Treasurer and the prayers therein contained, and ratifying and confirming the said order made by this Court on the 19th day of February, 1937, determining inheritance tax due to the State of Oregon upon the property and estate of said decedent, and granting to the executors such other and further relief as may be just and equitable.

Charles E. McCulloch, Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Ruth Hayes McGraw and Edmund Hayes, as Executors of the Will of Edward Stephen Hayes, Deceased.

[fol. 105] Thereafter and on or about April 24, 1937, respondent State Treasurer served and filed his

REPLY

reading, with caption and title and verification omitted, as follows:

For his reply to the Answer of executors, the state treasurer admits, denies and alleges as follows:

I

In reply to the allegations in paragraph II, the state treasurer admits that prior to September, 1933, decedent resided at Eau Claire, Wisconsin; that the Harris Trust and Savings Bank of Chicago, Illinois, (hereinafter called the Harris Bank) had custody of certain securities belonging to decedent, and from time to time, acted as decedent's agent in the purchase and sale of his securities; that about August 1, 1935, at decedent's direction, the Harris Bank sold a portion of said securities to the value of $450,000.00, and for a few days, pending execution of the trust instru-
[fol. 106] ment described in the state treasurer's objections, held the proceeds for decedent in the shape of Federal Reserve notes; that on August 15, 1935, title to said notes was transferred by decedent to the Harris Bank under the trust instrument described in the state treasurer's objections. As to the remaining alegations of paragraph II, the state treasurer has no knowledge or information sufficient to form a belief and therefore denies the same and the whole thereof.

II

Denies the allegations in paragraph III of said Answer.

III

In reply to the allegations of paragraph V, the state treasurer admits that the trust mentioned therein, and known as Edward Stephen Hayes Trust Number One, was executed by decedent August 15, 1935, at Portland, Oregon, and by the Harris Bank at Chicago, Illinois, on August 17, 1935; and that said trust agreement is the same instrument [fol. 107] set out in the state treasurer's objections; that on August 15, 1935, decedent owned the Federal Reserve notes mentioned and on that date transferred the same to the Harris Bank under said trust agreement. Denies each and every other allegation contained in paragraph V and the whole thereof.

IV

For further reply, the state treasurer alleges. That at the time of his death, and for several years prior thereto, decedent was a resident of and domiciled in the state of Oregon. Prior to becoming a resident of this state, he resided in the state of Wisconsin, but never resided in the state of Illinois. That for many years prior to his death, decedent was not engaged in any business other than conserving, investing and reinvesting his personal fortune. From time to time prior to August 15, 1935, decedent placed bonds and other intangible personal property in the custody of the Harris Bank for safe keeping and for convenience in selling and reinvesting the proceeds. The Harris Bank also [fol. 108] advised and assisted decedent in investment and reinvestment of his funds. That in August, 1935, decedent, then in his 79th year, possessed an estate amounting to over $1,000,000.00 invested exclusively in stocks, bonds and other intangibles.

V

That on or about August 15, 1935, decedent created the above-mentioned trust known as Edward Stephen Hayes Trust Number One, by means of which he gave to his children, grandchildren, and their families, a large portion of his estate, to-wit, $450,000.00. On the 19th day of September following, decedent created a second trust known as

"Edward Stephen Hayes Trust Number Two, dated September 19, 1935," by means of which he transferred to the Harris Bank as Trustee, substantially all of his remaining stocks and other intangibles of the value of about $600,000.00. In this trust, (herein referred to as Trust Number Two), decedent reserved the entire income to himself for [fol. 109] his lifetime, and after his death, the entire income to his widow for her lifetime. The distribution of trust property provided under Trust Number Two after the death of decedent and his wife, is substantially identical with the distribution, terms and conditions provided in said Trust Number One, and, in fact, said Trust Number Two provides for consolidation thereof with said Trust Number One, after the death of trustor and his wife. On September 25, 1935, decedent executed his Last Will and Testament, in which he bequeathed his remaining property to his wife.

VI

Said trusts were executed pursuant to a general plan of decedent for distributing his estate in contemplation of his death. That as a part of this plan, the $450,000.00 of assets conveyed to Trust Number One were, by decedent, converted into Federal Reserve notes a few days before execution of the trust instrument, for the sole purpose of establishing a [fol. 110] claim of situs for said assets in the state of Illinois at the time of creation of said trust. That neither prior to, nor after this transaction, did decedent ever hold any portion of his estate in the shape of Federal Reserve notes: but, on the contrary, kept his funds invested in income bearing property. And pursuant to decedent's intention expressed in said Trust Number One, the Harris Bank, as his trustee, forthwith reinvested the trust estate in stocks and bonds, which securities constituted the trust estate at the date of decedent's death. That the Illinois situs asserted by executors, for said assets in Trust Number One, was and is fictitious and transitory rather than actual; and decedent's entire scheme of temporarily converting his intangibles into Federal Reserve notes and reconverting the same into intangibles after establishment of Trust Number One, was adopted by him for the sole purpose of evading the inheritance tax of the state of Oregon on $450,000.00 of his taxable estate.

[fol. 111] Wherefore, state treasurer prays for the relief asked for in his Objections.

R. A. Reid, Deputy Inheritance Tax Auditor.

Thereafter and on or about September 18, 1937, appellants and respondent, through their respective attorneys of record, entered into and filed a

STIPULATION OF FACTS

reading, with caption and title omitted, as follows:

Come now Ruth Hayes McGraw and Edmund Hayes, executors of the estate of Edward Stephen Hayes, deceased, by and through their attorneys of record, and Rufus C. Holman, State Treasurer of the State of Oregon, by and through his attorney of record, and stipulates that the following is a true statement of facts relating to a transfer by said decedent of certain property by virtue of a trust agreement hereinafter referred to, dated August 15, 1935:

[fol. 112] I

Decedent died testate February 11, 1936, and was at the time of his death a resident of, and domiciled in the County of Multnomah, State of Oregon. Decedent was a physician by profession but had retired from active practice and had attained the age of 79 years at the time of his death.

II

Thereafter, the last will and testament of decedent was admitted to probate by this court, and in accordance with said will, Ruth Hayes McGraw, decedent's daughter, and Edmund Hayes, decedent's son, were appointed as executors and thereafter qualified and are now acting as executors of said will and the estate of decedent. The said last will and testament, on file in this court, is by this reference made a part of this stipulation of facts.

III

Decedent, prior to the time of establishment by him of a domicile in the State of Oregon, was and for over fifty years [fol. 113] had been a resident of and domiciled in the City of Eau Claire, in the State of Wisconsin. During the month

of September, 1933, decedent moved to Oregon, and established a domicile in Multnomah County, Oregon. For a period of over ten years prior to August 15, 1935, Harris Trust and Savings Bank, an Illinois corporation, (hereinafter referred to as "Harris Bank") had acted as agent of decedent as custodian of bonds and some stocks owned by decedent. Stocks so held by said Harris Bank included only so-called "market stocks," that is, stocks listed and actively traded on the principal security exchanges. As such agent said Harris Bank had collected income and principal on said bonds and dividends on stocks, had credited income so collected to a checking account of decedent in said Harris Bank, subject to decedent's order, had acted as decedent's financial agent in his investments in bonds, stocks, and reinvestments in bonds and stocks of moneys received from maturities of [fol. 114] principal of bonds and of moneys derived by Harris Bank from sales of bonds and stocks held by Harris Bank in said agency account for decedent. The bonds and stock certificates from time to time owned by decedent and held for decedent's account by Harris Bank were never physically present or situated within the State of Oregon, but were at all times while owned by decendent physically present and situated in Chicago, in the State of Illinois. In addition to securities thus administered by said Harris Bank as agent, decedent owned other personal property consisting for the most part of unlisted stocks, and certificates for said other stocks were held by decedent at Portland, Oregon, until the time of the establishment of the trust under agreement dated September 19, 1935, hereinafter referred to.

IV

On or about August 8, 1935, Harris Bank held in said agency account at Chicago, Illinois, bonds owned by decedent [fol. 115] of the par value of $691,000.00, and said bonds had a market value of not less than $625,000.00. On said date decedent owned other personal property, consisting for the most part of corporate stocks and balances on deposit in banks, of a value of approximately $400,000.00. On or about August 8, 1935, decedent directed Harris Bank to sell and liquidate sufficient of said bonds, owned by decedent and held by Harris Bank, to procure a sum which together with cash balances in decedent's account with Harris Bank would equal $450,000.00, and directed Harris Bank to use the sum

of $450,000.00 thus obtained to purchase, as decedent's agent, Federal Reserve Notes of the face value of $450,000.00. Said Harris Bank complied with said directions and between August 8, 1935, and August 12, 1935, as agent for decedent, sold in the open market bonds held by Harris Bank and owned by decedent, and from that source realized for decedent's account the sum of $176,062.01. On August 12, 1935, decedent borrowed from Harris Bank, on a demand [fol. 116] promissory note, the sum of $183,937.99. On said date decedent had a balance in his checking account in excess of $90,000.00, in addition to any sums herein referred to. Thereupon and prior to August 15, 1935, Harris Bank, with the cash balances in decedent's account with said Harris Bank, derived to the extent of $176,062.01 from said sale of bonds, to the extent of $183,937.99 from said loan by Harris Bank, and to the extent of $90,000.00 from credit balances in decedent's account from other sources, purchased for decedent forty-five (45) Federal Reserve Notes of the denomination of $10,000.00 each, and numbered from G00000031A to G00000040A, both inclusive, and from G00000126A to G00000160A, both inclusive, of the value of $450,000.00, and decedent thereupon became the owner of said Federal Reserve Notes. All of said Federal Reserve Notes were thereupon and prior to August 15, 1935, placed in a safe deposit box rented by decedent, being box No. 2100, in the vault of Harris Safe Deposit Company, in the City of Chi- [fol. 117] cago, Illinois, and remained in said box from the time they were placed therein until August 19, 1935. On August 19, 1935, certain of said Federal Reserve Notes were removed from said safety deposit box, but the remainder thereof remained in said safety deposit box, and were removed therefrom at times subsequent to August 19, 1935. At no time prior to August 19, 1935, were any of said Federal Reserve Notes within the State of Oregon, and the parties to this stipulation have no evidence that any of said Federal Reserve Notes have ever been within the State of Oregon.

V

Between August 12, 1935, and August 29, 1935, said Harris Bank, upon directions by decedent, and as decedent's agent, sold in the open market bonds held by said Harris Bank in said agency account, and as proceeds of said sales were received by it, paid said proceeds to itself on account of said

demand note, and on August 29, 1935, said demand note was [fol. 118] thus paid in full by decedent. Payments thus made on account of the principal due on said demand note were made in amounts and on dates as follows:

Date 1935	Paid	Balance Due
	.....	$183,937.99
Aug. 12	$120,191.07	63,746.92
13	41,635.83	22,111.09
14	1,175.00	20,936.09
15	1,246.52	19,689.57
16	5,300.52	14,389.05
17	11,377.62	3,011.43
19	1,037.99	1,973.44
21	245.56	1,727.88
21	1,727.88	.00
29		

VI

On August 15, 1935, decedent, then being in Multnomah County, Oregon, executed in counterparts that certain agreement dated August 15, 1935, between decedent, as Settlor, and said Harris Bank, as Trustee, to create a trust to be known and designated as "Edward Stephen Hayes Trust, Number One, dated August 15, 1935." Said counterparts of said agreement dated August 15, 1935, thus executed by decedent, were forwarded by United States air mail to said Harris Bank, at Chicago, Illinois. On or be- [fol. 119] fore August 17, 1935, said counterparts were received at Chicago, Illinois, by said Harris Bank, and on or before August 17, 1935, said counterparts were executed by said Harris Bank by its officers thereunto duly authorized. Exhibit A, attached to and made a part of "Objections of State Treasurer to Determination of Inheritance Tax," is a true copy of said agreement dated August 15, 1935.

VII

The transfer by decedent of said Federal Reserve Notes to said Harris Bank by said agreement of August 15, 1935 was made by decedent in contemplation of his death.

VIII

From time to time after August 19, 1935, said Federal Reserve Notes were removed from said safety deposit box No. 2100, and were thereafter used by said Harris Bank

purchase bonds and other personal property for the account of said Edward Stephen Hayes Trust Number One, and [fol. 120] property thus purchased by the use of said Federal Reserve Notes has at all times after August 19, 1935, been held and administered by said Harris Bank, as trustee of said Edward Stephen Hayes Trust Number One. None of the property thus acquired by said trustee for said Edward Stephen Hayes Trust Number One was ever owned by decedent, and in particular, said trustee did not purchase or otherwise acquire for said Edward Stephen Hayes Trust Number One any of the bonds or other assets which at any time were owned by decedent or which at any time constituted a part of the property held by said Harris Bank as agent for decedent.

IX

On or about September 19, 1935, decedent, then present in Multnomah County, Oregon, executed in counterparts that certain agreement dated September 19, 1935, between decedent, as Settlor, and said Harris Bank, as Trustee, to create a trust to be known as "Edward Stephen Hayes Trust, Number Two, dated September 19, 1935." Said [fol. 121] counterparts of said agreement of September 19, 1935, thus executed by decedent, were forwarded to said Harris Bank, at Chicago, Illinois; and on or before September 24, 1935, said counterparts were executed by said Harris Bank by its officers thereunto duly authorized. A true and correct copy of said agreement dated September 19, 1935, is attached to and made a part of the executors' "Petition for Order Determining Inheritance Tax," heretofore filed in this court, as Exhibit A to said petition. Said Exhibit A to said petition is by this reference made a part of this stipulation of facts. The making of an agreement, as finally set forth in said agreement dated September 19, 1935, was under consideration by decedent at the time of the preparation and execution of said agreement dated August 15, 1935, but decedent did not definitely conclude to make said agreement dated September 19, 1935, until some time subsequent to September 1, 1935.

[fol. 122] X

The order made and entered herein, dated February 19, 1937, determining inheritance tax, to which the objections of

State Treasurer to determination of inheritance tax were directed, determined as the gross estate of decedent subject to Oregon inheritance tax, property, the legal title to which was vested in decedent at the date of his death, and the property held by said Harris Bank, as trustee, on February 11, 1936, the date of decedent's death, and constituting the entire assets of said Edward Stephen Hayes Trust Number Two, established by said agreement dated September 19, 1935; but said gross estate subject to tax, so determined, did not include the property of the value of $450,000.00 transferred by decedent by said agreement of August 15, 1935, or any assets of said Edward Stephen Hayes Trust Number One acquired by said Harris Bank, as trustee, by the use of property so transferred by said agreement of August 15, 1935. If all of the property transferred by said agreement [fol. 123] dated August 15, 1935, were included in decedent's gross estate subject to Oregon inheritance tax, then the gross estate of decedent subject to such inheritance tax by the State of Oregon would be as follows:

Gross estate subject to inheritance tax as shown in said order dated February 19, 1937	$637,196.52
Additional amount, transfer by said agreement dated August 15, 1935	450,000.00
Total	$1,087,196.52

XI

Donald Hayes McGraw, one of the beneficiaries named in said agreements dated, respectively, August 15, 1935, and September 19, 1935, was, on and prior to August 15, 1935, and at all times subsequent thereto, has been the legally adopted son of Ruth Hayes McGraw, the decedent's daughter, and of Don McGraw, her husband.

This stipulation is entered into for the sole purpose of determining the facts herein set forth, and may be offered in evidence by either of the parties hereto as proof of the facts [fol. 124] herein recited, subject to the right of either party to object to the receipt in evidence of the entire stipulation or of any fact herein recited upon the ground of lack of materiality. But nothing herein set forth shall be construed by any court as an admission by said executors that the subject of said transfer by decedent by said agreement dated

August 15, 1935, or any assets acquired by said Harris Bank, as trustee, by the use of property so transferred by said agreement dated August 15, 1935, is subject to inheritance tax by the State of Oregon, or may be included in any way in the determination of the gross estate of said decedent subject to inheritance tax by the State of Oregon.

It is further stipulated and agreed that all of the documents on file in this court in the matter of the estate of Edward Stephen Hayes, deceased, may be considered as a part of the record in these proceedings to the same extent as though each of said documents were offered and received in evidence by this court in the proceedings relating to the ob-
[fol. 125] jections of the State Treasurer to the order of February 19, 1937, determining inheritance tax.

Dean H. Dickinson, of Attorneys for Rufus C. Holman, State Treasurer of Oregon. Charles E. McCulloch, Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Ruth Hayes McGraw and Edmund Hayes, Executors of the Estate of Edward Stephen Hayes, Deceased.

On or about September 16, 1937, respondent State Treasurer served, and on or about September 29, 1937, respondent State Treasurer filed, his

AMENDED OBJECTIONS OF STATE TREASURER TO DETERMINATION OF INHERITANCE TAX

reading, with caption and title and verification omitted, as follows:

Comes now Rufus C. Holman, State Treasurer, and objects to the determination of Inheritance Tax due to the
[fol. 126] State of Oregon in the matter of the estate of Edward Stephen Hayes, deceased, as determined in an Order of this Court made and entered herein, on the 19th day of February, 1937, on the ground that said determination of inheritance tax fails to include or determine any tax in favor of the state upon the distribution by said deceased of a material portion of his estate by means of a certain trust executed August 15, 1935. The State Treasurer alleges:

I

That said decedent died testate February 11, 1936, and was, at the time of his death, a resident of, and domiciled

in the city of Portland, County of Multnomah and state of Oregon. Decedent was a physician by profession but retired from active practice, and had attained 79 years of age at the time of his death.

II

That until about six months prior to his death, said deceased was the owner of stocks, bonds and other intangible [fol. 127] personal property of a value in excess of $1,000,000.00. That on or about the first day of August, 1935, decedent sold a large portion of said bonds and stocks, and on the 15th day of August, 1935, transferred the proceeds thereof, amounting to $450,000.00, to the Harris Trust and Savings Bank, an Illinois corporation of Chicago, Illinois, in trust, however, to be invested, held and distributed by said Harris Trust and Savings Bank as Trustee for the use of the son and daughter of decedent and their respective spouses and children, according to the terms of a certain irrevocable declaration of trust. A copy of said declaration of trust is hereby attached, marked Exhibit A, and made a part of these Objections.

III

That at the time he transferred said $450,000.00 in trust, decedent was in failing health and suffering from the illness which resulted in his death six months later. That said [fol. 128] transfer of property in trust was made and intended by decedent as an advancement and division of his estate in contemplation of his death.

IV

That the transfer by decedent of said $450,000.00 in trust for his beneficiaries constituted a distribution of decedent's estate in contemplation of his death subject to inheritance tax of the State of Oregon as a part of his taxable estate. That shortly after the creation of said trust, the funds placed therein by decedent were reinvested by the Trustee in stocks, bonds and other intangibles which at the date of decedent's death had a fair value of not less than $450,000.00. That no portion of the value of the property so transferred by decedent was included in his taxable estate, or considered in fixing inheritance tax thereon; and said Order determining inheritance tax herein, does not include or determine any inheritance tax in favor of the

[fol. 129] State of Oregon on the value of the property so distributed by decedent through said trust.

As a second ground of Objection to said Determination of Inheritance Tax, the State Treasurer alleges:

I

That Donald Hayes McGraw, is an adopted son of Ruth Hayes McGraw, daughter of this decedent. That by the terms of "Edward Stephen Hayes Trust No. 2," the decedent devised and bequeathed to Donald Hayes McGraw, a distributive share of the property placed by deceased in said trust, which share at the date of decedent's death, had a present value of $16,268.52. Said distributive share was included in the determination of inheritance tax at a value of $15,745.66. That by the terms of "Edward Stephen Hayes Trust No. 1," hereinabove described, deceased bequeathed to said Donald Hayes McGraw, a further distributive share in the property placed by deceased in said Trust No. 1, which share had a present value, at the date of [fol. 130] decedent's death of $15,859.62. The distributive share of Donald Hayes McGraw in Trust No. 1, was not included in decedent's taxable estate and no inheritance tax was determined thereon.

II

That the distributive shares of said beneficiary are subject to inheritance tax according to the rates prescribed in paragraph 3, in Chap. 199, Oregon Laws, 1933, as for legacies passing to persons of no relation to the deceased. That said determination of inheritance tax is erroneous in that it fails to include any inheritance tax in favor of the State of Oregon on said distributive share in "Edward Stephen Hayes Trust No. 1"; and in that it fails to determine tax on his distributive shares in "Edward Stephen Hayes Trust No. 2," under the provision of paragraph 3 of rates.

Wherefore the State Treasurer prays that said Order determining inheritance tax in this estate of date February 19, 1937, be vacated and set aside. That the Court reassess [fol. 131] and redetermine inheritance tax of the State of Oregon in said estate by including therein, the property embraced in said trust at its fair value on February 11, 1936. That the Court cause the property of said trust to be appraised or otherwise valued at its fair value as of the

date of decedent's death. That the Court determine inheritance tax on the distributive shares of Donald Hayes McGraw, according to the rates prescribed for tax upon legacies to persons of no relation to the decedent. That the Court grant the State Treasurer such other and further relief as may be just and equitable.

R. A. Reid, Deputy Inheritance Tax Auditor.

On or about September 24, 1937, appellants served and filed their

ANSWER OF EXECUTORS TO AMENDED OBJECTIONS OF STATE TREASURER TO DETERMINATION OF INHERITANCE TAX

reading, with caption and title and verification omitted, as follows:

[fol. 132] Ruth Hayes McGraw and Edmund Hayes, in their representative capacity as the duly appointed, qualified and acting executors of the last will and testament of decedent, and in their individual capacities as persons entitled to distributive shares of the estate of decedent and of two certain trusts established by decedent in his lifetime by agreements dated respectively August 15, 1935, and September 19, 1935, naming Harris Trust and Savings Bank of Chicago, Illinois, as trustee, make this, their answer to the "Amended Objections of State Treasurer to Determination of Inheritance Tax," heretofore filed in this court. Said Ruth Hayes McGraw and Edmund Hayes, in their representative and individual capacities, are hereinafter referred to for brevity as the "executors."

I

The executors for their answer to paragraphs I, II, III and IV of said amended objections admit and deny the allegations therein contained and make affirmative allega-
[fol. 133] tions with respect thereto in the same manner and to the same extent as is set forth in the "Answer of Executors to Objections of State Treasurer to Determination of Inheritance Tax" heretofore filed in this court; and the said answer of the executors is by this reference incorporated herein as the executors' answer to said paragraphs I, II, III and IV, to the same extent as though said executors' answer were herein set forth verbatim.

II

The executors for their answer to paragraph I of the second ground of objection set forth in said amended objections admit that Donald Hayes McGraw is an adopted son of Ruth Hayes McGraw, daughter of the decedent, that Donald Hayes McGraw was a beneficiary of "Edward Stephen Hayes Trust No. 2" and was a beneficiary of "Edward Stephen Hayes Trust No. 1," that the distributive share of Donald Hayes McGraw in said Trust No. 1 was not included as a part of decedent's taxable estate in said Order Determining Inheritance Tax, and that the distribu-
[fol. 134] tive share of said Donald Hayes McGraw in said Trust No. 2 was included in the determination of inheritance tax at a value of $15,745.66, but except as so admitted the executors deny the allegations of said paragraph I; and the executors allege further, in answer to said paragraph I, that said Donald Hayes McGraw was, prior to August 15, 1935, and at all times subsequent thereto has been the legally adopted son of Ruth Hayes McGraw, daughter of said decedent, and of Don McGraw, the husband of said Ruth Hayes McGraw.

III

The executors for their answer to paragraph II of the second ground of objection as set forth in said amended objections admit that the determination of inheritance tax heretofore made did not include any tax upon the distributive share of Donald Hayes McGraw in said Trust No. 2 and said Trust No. 1 under the third paragraph of Chapter 199, Oregon Laws 1933, but except as so admitted the ex-
[fol. 135] ecutors deny the allegations of said paragraph II.

Wherefore, the executors pray for an order of this court overruling and denying said amended objections by State Treasurer and the prayers therein contained, and ratifying and confirming the said order made by this court on the 19th day of February, 1937, determining inheritance tax due to the State of Oregon upon the property and estate of said decedent, and granting to the executors such other and further relief as may be just and equitable.

Charles E. McCulloch, Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Ruth Hayes McGraw and Edmund Hayes, as Executors of the Will of Edward Stephen Hayes, Deceased, and as Individuals.

[fol. 136] Thereafter and on or about November 17, 1937, appellants and respondent, by and through their attorneys of record, entered into and filed a

STIPULATION

reading, with caption and title omitted, as follows:

For the purpose of correcting and completing the record in the matter of the inheritance tax in the above entitled estate, it is hereby Stipulated by and between the State Treasurer and the executors of said estate:

That "Exhibit A" attached to and made a part of the original Objections of the State Treasurer herein, and which was omitted from State Treasurer's Amended Objections, shall be for all purposes considered as a part of said Amended Objections the same as though attached thereto;

And that the State Treasurer's Reply to executor's Answer to the original Objections herein, shall also be con-
[fol. 137] sidered as a Reply to executor's Answer to the Amended Objections.

Dated this 16th day of November, 1937.

Dean H. Dickinson, Of Attorneys for State Treasurer. Charles E. McCulloch, Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Executors.

Thereafter and on or about March 5, 1938, appellants and respondent, by and through their attorneys of record, entered into and filed a

FURTHER STIPULATION OF FACTS

reading, with caption and titled omitted, as follows:

Come now Ruth Hayes McGraw and Edmund Hayes, as executors of the estate of Edward Stephen Hayes, Deceased, and as beneficiaries and distributees of the estate of said decedent subject to tax, by and through their attorneys of record, and Rufus C. Holman, State Treasurer of the State
[fol. 138] of Oregon, by and through his attorney of record, and stipulate that the following is a true statement of the facts relating to the amount of inheritance tax due to the State of Oregon on account of said estate under certain con-

ditions herein recited. In so far as this stipulation recites amounts for gross estate, net estate, distributive shares, taxes on net estate and collateral taxes under various conditions hereinafter set forth, the sole purpose is to establish the correctness of computations relating thereto, but this stipulation shall not be construed as an admission by any of the parties hereto with respect to the correctness as a matter of law of any of the varying bases upon which said computations are made as hereinafter set forth.

I

If the assets transferred by decedent to Harris Trust and Savings Bank of Chicago, Illinois, by that certain agreement dated August 15, 1935, between decedent and Harris Trust and Savings Bank, are not as a matter of law subject to [fol. 139] inheritance tax by the State of Oregon, the gross estate of decedent subject to inheritance tax, the net estate of decedent subject to inheritance tax, the tax on said net estate, the distributive shares of beneficiaries of said estate, and the additional or collateral taxes on said distributive shares are as follows:

(a) Gross Estate of Decedent Subject to Tax.

Value of property included in inventory and appraisement	$ 28,228.91
Value of property held on date of death by Harris Trust and Savings Bank, as trustee under agreement dated September 19, 1935	608,967.61
Total	$637,196.52

(b) Net Estate of Decedent Subject to Tax.

Gross estate as shown in subparagraph (a)	$637,196.52
Deductions as determined by order of court dated February 19, 1937	44,761.38
Net Estate	$592,435.14

(c) Tax on Net Estate.

Tax on net estate of $592,435.14	$ 35,018.51

[fol. 140] (d) Distributive Share of Net Estate

Beneficiary or Distributee	Relationship to decedent	Share
Miriam Pierce Hayes	Widow	$131,063.14
Edward Sparrow	Nephew	5,000.00
Hayes Sparrow	Nephew	5,000.00
Margaret C. Hayes	Sister-in-law	5,000.00
Addison Hayes	Nephew	5,000.00
Sue Catherine Hayes	Niece	5,000.00
Gertrude Hollister	Cousin	3,000.00
Katherine Bullen	Cousin	3,000.00
Etta Pedersen	None	1,000.00
Ed Butterfield	None	1,000.00
Ruth Hayes McGraw	Daughter	51,073.61
Don McGraw	Son-in-law	35,567.31
Edmund Hayes	Son	53,033.03
Anna Wheeler Hayes	Daughter-in-law	64,821.92
Donald Hayes McGraw	Adopted son of daughter	25,509.02
Edmund Hayes, Jr.	Grandson	49,591.78
Frederick Wheeler Hayes	Grandson	49,591.78
Philip Schuyler Hayes	Grandson	49,591.78
Cornelia Ingram Hayes	Granddaughter	49,591.77
Total Net Estate		$592,435.14

(e) Additional or Collateral Inheritance Tax on Shares of Beneficiaries Other Than Donald Hayes McGraw

Edward Sparrow	$60.00
Hayes Sparrow	60.00
Margaret C. Hayes	340.00
Addison Hayes	60.00
Sue Catherine Hayes	60.00
Gertrude Hollister	20.00
Katherine Bullen	20.00
Etta Pedersen	20.00
Ed Butterfield	20.00
Don McGraw	5,203.46
Anna Wheeler Hayes	11,795.48
Total	$17,658.94

[fol. 141] (f) Additional or Collateral Inheritance Tax on Distributive Share of Donald Hayes McGraw

If as a matter of law Donald Hayes McGraw is within the classification of "any lineal descendant of the deceased" within the meaning of Section 10-603, Oregon Code,

1930, as amended by Chapter 199, Oregon Laws, 1933, there is no additional or collateral inheritance tax due upon his distributive share. If Donald Hayes McGraw is not within the classification of "any lineal descendant of deceased" within the meaning of Section 10-603 as amended, the additional or collateral inheritance tax upon his distributive share of $25,509.02 is $3,191.80.

(g) Total Inheritance Tax

If Donald Hayes McGraw is within the classification of "any lineal descendant of the deceased" within the meaning of said Section 10-603 as so amended, the total inheritance tax due to the State of Oregon under the facts as [fol. 142] stated in this paragraph I is the sum of $52,677.45. If Donald Hayes McGraw is not within the classification of "any lineal descendant of the deceased" within the meaning of said Section 10-603 as so amended, the total inheritance tax under the facts as stated in this paragraph I is the sum of $55,869.25.

II

If the assets transferred by decedent to Harris Trust and Savings Bank of Chicago, Illinois, by that certain agreement dated August 15, 1935, between decedent and said Harris Trust and Savings Bank, are as a matter of law subject to inheritance tax by the State of Oregon, the gross estate of decedent subject to inheritance tax, the net estate of decedent subject to inheritance tax, the tax on said net estate, the distributive shares of beneficiaries of said estate, and the additional or collateral taxes on said distributive shares are as follows:

[fol. 143] (a) Gross Estate of Decedent Subject to Tax

Value of property included in inventory and appraisement	$28,228.91
Value of property held on date of death by Harris Trust and Savings Bank, as trustee under agreement dated September 19, 1935	608,967.61
Value of property transferred by decedent to Harris Trust and Savings Bank as trustee under agreement dated August 15, 1935	450,000.00
Total	$1,087,196.52

(b) Net Estate of Decedent Subject to Tax

Gross Estate as shown in subparagraph (a)	$1,087,196.52
Deductions as determined by order of court dated February 19, 1937	44,761.38
Net Estate	$1,042,435.14

(c) Tax on Net Estate

Tax on net estate of $1,042,435.14	$81,291.57

[fol. 144] (d) Distributive Share of Net Estate.

Beneficiary or Distributee	Relationship to decedent	Share
Miriam Pierce Hayes	Widow	$ 135,364.80
Edward Sparrow	Nephew	5,000.00
Hayes Sparrow	Nephew	5,000.00
Margaret C. Hayes	Sister-in-law	5,000.00
Addison Hayes	Nephew	5,000.00
Sue Catherine Hayes	Niece	5,000.00
Gertrude Hollister	Cousin	3,000.00
Katherine Bullen	Cousin	3,000.00
Etta Pedersen	None	1,000.00
Ed Butterfield	None	1,000.00
Ruth Hayes McGraw	Daughter	115,305.33
Don McGraw	Son-in-law	86,735.90
Edmund Hayes	Son	118,915.44
Anna Wheeler Hayes	Daughter-in-law	140,635.73
Donald Hayes McGraw	Adopted son of daughter	46,998.80
Edmund Hayes, Jr.	Grandson	91,369.78
Frederick Wheeler Hayes	Grandson	91,369.78
Philip Schuyler Hayes	Grandson	91,369.79
Cornelia Ingram Hayes	Granddaughter	91,369.79
Total Net Estate		$1,042,435.14

[fol. 145] (e) Additional or Collateral Inheritance Tax on Shares of Beneficiaries Other than Donald Hayes McGraw:

Edward Sparrow	$60.00
Hayes Sparrow	60.00
Margaret C. Hayes	340.00
Addison Hayes	60.00
Sue Catherine Hayes	60.00
Gertrude Hollister	20.00
Katherine Bullen	20.00
Etta Pedersen	20.00
Ed Butterfield	20.00
Don McGraw	17,273.98
Anna Wheeler Hayes	30,748.93
Total	$48,682.91

(f) Additional or Collateral Inheritance Tax on Distributive Share of Donald Hayes McGraw.

If as a matter of law Donald Hayes McGraw is within the classification of "any lineal descendant of the deceased" within the meaning of Section 10-603, Oregon Code, 1930, as amended by Chapter 199, Oregon Laws, 1933, there is no additional or collateral inheritance tax due upon his distributive share. If Donald Hayes McGraw is not within the [fol. 146] classification of "any lineal descendant of deceased" within the meaning of Section 10-603 as so amended, the additional or collateral inheritance tax upon his distributive share of $46,998.80 is $7,489.76.

(g) Total Inheritance Tax.

If Donald Hayes McGraw is within the classification of "any lineal descendant of the deceased" within the meaning of said Section 10-603 as so amended, the total inheritance tax due to the State of Oregon under the facts as stated in this paragraph II is the sum of $129,974.48. If Donald Hayes McGraw is not within the classification of "any lineal descendant of the deceased" within the meaning of said Section 10-603 as so amended, the total in-[fol. 147] heritance tax under the facts as stated in this paragraph II is $137,464.24.

Dean H. Dickinson, Attorney for State Treasurer, Charles E. McCulloch, Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Ruth Hayes McGraw and Edmund Hayes, as Executors of the estate of Edward Stephen Hayes, Deceased, and as beneficiaries and distributees of the estate of said decedent.

Thereafter and on or about March 24, 1938, the said Circuit Court made and entered its

ORDER SUSTAINING OBJECTIONS OF STATE TREASURER TO ORDER DETERMINING INHERITANCE TAX, AND REDETERMINING INHERITANCE TAX

reading, with caption and title omitted, as follows:

[fol. 148] On or about February 19, 1937, this Court made an order determining inheritance tax in the above entitled

estate, determining a total inheritance tax due to the State of Oregon in the sum of $60,325.18. Thereafter and within the time allowed by law Rufus C. Holman, State Treasurer, filed his objections to said order upon the ground—

(a) That said order was erroneous in that it failed to include as a part of the gross estate of decedent subject to tax property of the value of $450,000, transferred by decedent to Harris Trust and Savings Bank by agreement dated August 15, 1935.

Thereafter the State Treasurer filed his amended objections to said order determining tax upon the ground as stated in said paragraph (a) next preceding, and upon the further ground that the distributive share of Donald Hayes McGraw, the adopted son of Ruth Hayes McGraw, daughter of decedent, was subject to inheritance tax according to the [fol. 149] rates prescribed by paragraph 3 in Chapter 199, Oregon Laws, 1933, as for legacies passing to persons of no relation to the deceased.

Thereafter Edmund Hayes and Ruth Hayes McGraw, as executors of the will of the above named decedent, and as individuals, filed their answer to said objections and their answer to said amended objections.

Thereafter the matter was submitted to this Court upon stipulated facts and upon written briefs filed by attorneys of record for the State Treasurer and for Ruth Hayes McGraw and Edmund Hayes as such executors and as individuals.

The Court being advised in the premises, it is hereby Ordered, Adjudged and Decreed as follows:

1. The objections of the State Treasurer to the previous determination of inheritance tax in said estate are sustained upon all of the grounds alleged in said amended objections.

[fol. 150] 2. The transfer by decedent of forty-five Federal Reserve notes of the denomination of $10,000 each, pursuant to agreement dated August 15, 1935, between decedent and Harris Trust and Savings Bank, was a transfer of property within the jurisdiction of the State of Oregon and was subject to inheritance tax by the State of Oregon,

as a distribution and division of said decedent's estate made in contemplation of his death.

3. Donald Hayes McGraw, adopted son of decedent's daughter, Ruth Hayes McGraw, is not a lineal descendant of said decedent within the meaning of the classification in the first paragraph of Section 10,603, Oregon Code, 1930, as amended by Chapter 199 of the Oregon Laws of 1933, and the distributive share of said Donald Hayes McGraw is subject to the additional rates of tax provided in said Section 10,603 as so amended on transfers to persons of no relationship to the decedent.

[fol. 151] 4. The gross estate of decedent subject to tax is $1,087,196.52. The amount of allowable deductions is the sum of $44,761.38. The net estate of decedent subject to tax is $1,042,435.14.

5. The shares of beneficiaries and distributees of said net estate are as follows:

Beneficiary or Distributee	Relationship to decedent	Share
Miriam Pierce Hayes	Widow	$ 135,364.80
Edward Sparrow	Nephew	5,000.00
Hayes Sparrow	Nephew	5,000.00
Margaret C. Hayes	Sister-in-law	5,000.00
Addison Hayes	Nephew	5,000.00
Sue Catherine Hayes	Niece	5,000.00
Gertrude Hollister	Cousin	3,000.00
Katherine Bullen	Cousin	3,000.00
Etta Pedersen	None	1,000.00
Ed Butterfield	None	1,000.00
Ruth Hayes McGraw	Daughter	115,305.33
Don McGraw	Son-in-law	86,735.90
Edmund Hayes	Son	118,915.44
Anna Wheeler Hayes	Daughter-in-law	140,635.73
Donald Hayes McGraw	Adopted son of daughter	46,998.80
Edmund Hayes, Jr.	Grandson	91,369.78
Frederick Wheeler Hayes	Grandson	91,369.78
Philip Schuyler Hayes	Grandson	91,369.79
Cornelia Ingram Hayes	Granddaughter	91,369.79
Total Net Estate		$1,042,435.14

[fol. 152] 6. The inheritance tax on said net estate of $1,042,435.14 is the sum of $81,291.57.

7. The additional or collateral inheritance taxes on shares of beneficiaries is as follows:

Edward Sparrow	$60.00
Hayes Sparrow	60.00
Margaret C. Hayes	340.00
Addison Hayes	60.00
Sue Catherine Hayes	60.00
Gertrude Hollister	20.00
Katherine Bullen	20.00
Etta Pedersen	20.00
Ed Butterfield	20.00
Don McGraw	17,273.98
Anna Wheeler Hayes	30,748.93
Donald Hayes McGraw	7,489.76
Total	$56,172.67

8. The total inheritance taxes due to the State of Oregon, including said taxes upon said net estate and said additional or collateral taxes, is the sum of $137,464.24.

9. The executors are hereby authorized and directed to pay to the State Treasurer of the State of Oregon said sum of $137,464.24, subject to credit on account of payments heretofore made by the executors to the State Treasurer on account of inheritance taxes upon said estate, to-[fol. 153] gether with interest on the balance unpaid on account of said tax, at the rate of 6 per cent per annum from October 11, 1936.

Dated March 24, 1938.

Geo. Tazwell, Circuit Judge in Probate.

Thereafter and on or about March 26, 1938, appellants duly served and filed their

NOTICE OF APPEAL

reading, with caption and title omitted, as follows:

To Rufus C. Holman, State Treasurer of the State of Oregon, and Dean H. Dickinson, his attorney of record:

Each of you is hereby notified that Ruth Hayes McGraw and Edmund Hayes, as executors of the estate of Edward

Stephen Hayes, deceased, and in their individual capacities as persons entitled to distributive shares of the estate of [fol. 154] decedent, desire to and do hereby appeal to the Supreme Court of the State of Oregon from the order of the above entitled court bearing date and entered of record on March 24, 1938, in the above entitled matter, in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, sustaining objections of the State Treasurer to order determining inheritance tax and redetermining inheritance tax payable to the State of Oregon by said estate, and adjudging and decreeing that there is inheritance tax due to the State of Oregon in the sum of $137,464.24, subject to credit on account of payments heretofore made by the executors to the State Treasurer on account of inheritance taxes upon said estate, together with interest on the balance unpaid on account of said tax [fol. 155] at the rate of 6 per cent per annum from October 11, 1936, and from the whole of said order and each and every part thereof.

Charles E. McCulloch, Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Ruth Hayes McGraw and Edmund Hayes, as Executors and as individuals.

Thereafter and within the time allowed by law appellants filed their

UNDERTAKING ON APPEAL

Respectfully submitted,
Charles E. McCulloch, Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Appellants.

[fol. 156] STATE OF OREGON,
County of Multnomah, ss:

Due service of the within Appellants' Abstract of Record is hereby accepted at Portland, Oregon, this 16 day of April, 1938, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood, of attorneys for appellants.

(Sgd.) Dean H. Dickinson, of Attorneys for Respondent.

[Stamp:] Supreme Court, State of Oregon. Filed Jan. 17, 1939. Arthur S. Benson, Clerk.

IN THE SUPREME COURT OF THE STATE OF OREGON

No. 3351—January 17, 1939
McGRAW and HAYES, as Executors, Appellants, v. HOLMAN, State Treasurer, Respondent

Appeal from Circuit Court, Multnomah County.

George Tazwell, Judge

Argued and Submitted October 7, 1938

Department 1

Fletcher Rockwood and Charles E. McCulloch (Carey, Hart, Spencer & McCulloch on the brief), all of Portland, for appellants.

Dean H. Dickinson, of Portland, for respondent.

Rossman, J.
Modified.

ROSSMAN, J.:

This is an appeal from an order of the probate department of the circuit court of Multnomah county, entered March 24, 1938, which determines that the value of the estate of Edward Stephen Hayes, deceased, subject to inheritance taxation, is $1,042,435.14; that the inheritance tax payable by it is $81,291.57; and that the collateral inheritance tax on the shares of the beneficiaries is $56,172.67. The latter includes a challenged tax of $7,490.76 upon the share of Donald Hayes McGraw, the adopted son of Ruth Hayes McGraw, daughter of the decedent. The total of the above tax is $137,464.24. The appellants, Ruth Hayes McGraw and Edmund Hayes, are the two children of the deceased. They appealed, not only in their individual capacities but also as the executors of the estate.

The order just mentioned succeeded one entered on February 19, 1937, which found that the value of the net estate of the same decedent, subject to taxation, was $592,435.14; that the inheritance tax was $35,018.51; and that the collat-

eral tax upon the shares of the beneficiaries was $25,306.67; being a total of $60,325.18. The executors, being satisfied therewith, paid the latter sum. The order of March 24, 1938, was made after the State Treasurer had presented objections to the first order, and the probate department had sustained them.

This cause presents the following issues: (1) Was the situs of the personal property which the probate department employed as the basis for increasing the net value of the estate from $592,435.14 to $1,042,435.14, that is, $450,000, in Illinois, where the executors say that it was, or in Oregon, as the State Treasurer contends; and (2) was Donald Hayes McGraw (the adopted son of Ruth Hayes McGraw, daughter of the decedent) a "lineal descendant of deceased" within the contemplation of the first paragraph of § 10-603, Oregon Code 1930, as amended by 1933 Session Laws, chapter 199.

There is no controversy concerning the facts—they are set forth in a stipulation of the parties. Edward Stephen Hayes, the deceased, who was 79 years of age at the time of his death, February 11, 1936, had been domiciled for more than fifty years preceding 1933 in Eau Claire, Wisconsin, where he practiced medicine and accumulated a large estate. In September, 1933, he moved to Oregon and established a domicile in Multnomah county. There, as a retired physician, he resided for two years and five months before death overtook him.

For a period of more than ten years prior to August 15, 1935, Harris Trust & Savings Bank, an Illinois corporation, had acted as the agent of the decedent and as the custodian of most of his securities. These consisted of bonds and stocks listed upon the security exchanges. As financial agent, the bank collected dividends on the stocks, income upon the bonds and the principal of the latter whenever maturities occurred. The sums collected were credited to Dr. Hayes' checking account. Upon request the bank made investments for him. The following is quoted from the stipulation:

"The bonds and stock certificates from time to time owned by the decedent and held for decedent's account by Harris Bank were never physically present or situated within the State of Oregon, but were at all times while owned by decedent physically present and situated in Chicago in the State of Illinois."

Other securities owned by Dr. Hayes which were not listed upon the security exchanges were in his possession in Oregon after he had moved to this state. August 8, 1935, the bank possessed bonds owned by Dr. Hayes of the market value of not less than $625,000. On the same day Dr. Hayes owned other personal property consisting for the most part of stocks and money on deposit in banks in an amount of approximately $400,000. We quote again from the stipulation:

"On or about August 8, 1935, decedent directed Harris Bank to sell and liquidate sufficient of said bonds, owned by decedent and held by Harris Bank, to procure a sum which together with cash balances in decedent's account with Harris Bank would equal $450,000.00, and directed Harris Bank to use the sum of $450,000.00 thus obtained to purchase, as decedent's agent, Federal Reserve Notes of the face value of $450,000.00. Said Harris Bank complied with said directions and between August 8, 1935, and August 12, 1935, as agent for decedent, sold in the open market bonds held by Harris Bank and owned by decedent, and from that source realized for decedent's account the sum of $176,062.01. On August 12, 1935, decedent borrowed from Harris Bank, on a demand promissory note, the sum of $183,937.99. On said date decedent had a balance in his checking account in excess of $90,000.00, in addition to any sums herein referred to. Thereupon and prior to August 15, 1935, Harris Bank, with the cash balances in decedent's account with said Harris Bank, derived to the extent of $176,062.01 from said sale of bonds, to the extent of $183,937.99 from said loan by Harris Bank, and to the extent of $90,000.00 from credit balances in decedent's account from other sources, purchased for decedent forty-five (45) Federal Reserve Notes of the denomination of $10,000.00 each, and numbered * * * of the value of $450,000.00, and decedent thereupon became the owner of said Federal Reserve Notes. All of said Federal Reserve Notes were thereupon and prior to August 15, 1935, placed in a safe deposit box rented by decedent, being box No. 2100, in the vault of Harris Safe Deposit Company, in the City of Chicago, Illinois, and remained in said box from the time they were placed therein until August 19, 1935. * * * Between August 12, 1935, and August 29, 1935, said Harris Bank, upon directions by decedent, and as decedent's agent, sold in the open market bonds held by said

Harris Bank in said agency account, and as proceeds of said sales were received by it, paid said proceeds to itself on account of said demand note, and on August 29, 1935, said demand note was thus paid in full by decedent."

August 17, 1935, the bank executed a trust instrument which Dr. Hayes, as settlor, had signed in Oregon two days previously. This instrument provided that the trust which it created should be irrevocable and should be known as the "Edward Stephen Hayes Trust Number One, dated August 15, 1935." By its terms Dr. Hayes sold and assigned to the bank the aforementioned 45 federal reserve notes and instructed it to "invest and reinvest all funds from time to time available for investment or reinvestment in whatever form of property real or personal the trustee, in the exercise of its discretion, shall deem proper and for the best interests of the trust estate." The instrument directed the trustee, however, before making investments, to obtain the written approval of certain of the beneficiaries of the trust named in the instrument. The beneficiaries of the trust were the daughter Ruth, the son Edmund, their spouses and their children. Dr. Hayes reserved no control whatever over the above federal reserve notes after having assigned them to the bank, and the trust instrument gave him no voice in the management of the trust. It made no provision for payment to him of any part of the principal or income. The stipulation recites:

"The transfer by decedent of said Federal Reserve Notes to said Harris Bank of said agreement of August 15, 1935, was made by decedent in contemplation of his death."

After the trust instrument had been signed the bank invested the aforementioned $450,000 in securities. Concerning the latter, the stipulation states:

"Property thus purchased by the use of said Federal Reserve Notes has at all times after August 19, 1935, been held and administered by said Harris Bank, as trustee of said Edward Stephen Hayes Trust Number One. None of the property thus acquired by said trustee for said Edward Stephen Hayes Trust Number One was ever owned by decedent, and in particular, said trustee did not purchase or otherwise acquire for said Edward Stephen Hayes Trust Number One any of the bonds or other assets which at any

time were owned by decedent or which at any time constituted a part of the property held by said Harris Bank as agent for decedent."

September 19, 1935, Dr. Hayes, as settlor, and the bank, as trustee, executed another trust instrument which created "Edward Stephen Hayes Trust Number Two, dated September 19, 1935." This instrument transferred from Dr. Hayes to the bank securities possessing a par value of $295,359.20. The income of this trust was reserved to Dr. Hayes for his lifetime and there was also reserved to him the power to revoke the trust or modify any of its terms. Upon the death of Dr. Hayes $33,000 of the principal of the estate became payable to nine individuals mentioned in the instrument. The income from the remaining principal was payable to his widow, and after her death to the McGraw and Hayes families in a manner similar to that described in Trust Number One. The appellants present no contention that the assets of Trust Number Two were not subject to the inheritance tax exactions of this state. Their brief expressly states: "The executors have never contended that the assets of Trust Number Two are not subject to inheritance tax." Nor do they contend that any part of the estate, except that included in Trust Number One, is exempt from the tax laws of Oregon. Section 10-601, Oregon Code 1930, provides:

"All property within the jurisdiction of the state, * * * whether tangible or intangible, which shall pass or vest by * * * will, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death of the grantor, * * * shall be and is subject to tax at the rate hereinafter specified * * *."

It will be observed from the fact stated in preceding paragraphs that the property which Dr. Hayes sold and assigned to the bank was the federal reserve notes. It was their transfer, if any, which was subject to the tax with which we are concerned. In order to obtain these federal reserve notes he used funds on deposit with the Chicago bank, borrowed some money and sold bonds until he had a total of $450,000. Then he purchased the notes. However, neither his preceding deposit nor the securities which were sold

before the necessary cash was realized were conveyed to the bank. Nothing was conveyed to it except the federal reserve notes. Likewise, Dr. Hayes did not sell nor transfer to the bank the securities which the bank later purchased with the federal reserve notes. It is clear that he did not transfer to the bank those securities because he never owned them. Thus, the property which he assigned and transferred to the bank was the federal reserve notes. We repeat that if any transaction was taxable it was the transfer of these notes from Dr. Hayes to the bank.

The layman's word for federal reserve notes is paper money. In 31 U. S. C. A., § 462, it is stated:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender * * *."

In Blodgett v. Silberman, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410, the court held that "a small amount of cash, $287.48, in bank notes and coin in a safe-deposit box" was "tangible property and cannot be distinguished from the paintings and furniture * * *." Thus, these federal reserve notes were not intangibles—mere choses in action—but were tangible personal property. See, in addition to the decision just cited, Snodgrass' Estate, 22 Pa. D. & C. 598, and Waldron's Estate, 84 Colo. 1, 267 P. 191. Had Dr. Hayes sold or assigned to the bank $450,000 worth of gold bullion, grain or any other kind of tangible personal property, the legal character of that property would have been no different than the federal reserve notes. Thus, the subject-matter of the transaction between him and the bank was tangible personal property.

The stipulation recites that the transfer of the federal reserve notes was made in contemplation of death. It is well settled that under the Fourteenth Amendment to the federal Constitution the privilege of taxing the right of succession to the ownership of tangible personal property can be exercised only by the state which has jurisdiction over the property; that is, by the state in which the property has acquired an actual situs. It is unnecessary to support this statement with the citation of authority, but the following decisions illustrate its application: City Bank Farmers' Trust Co. v. Schnader, 293 U. S. 112, 79 L. Ed.

228, 55 S. Ct. 29; Blodgett v. Silberman, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410; Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, 42 A. L. R. 316; Haas v. Holman, 143 Or. 141, 21 P. 795; and In Re Brown's Estate, 274 N. Y. 10, 8 N. E. (2d) 42.

The state contends that the situs of all personal property, whether tangible or intangible, is presumptively the same as the domicile of its owner, and cites in support of that contention Endicott, Johnson & Co. v. Multnomah County, 96 Or. 679, 190 P. 1109, and Callendar Nav. Co. v. Pomeroy, 61 Or. 343, 122 P. 758. In the first of these dicisions the court was concerned with accounts receivable—intangible personal property; in the second with steamboats that plied the Columbia river calling at various ports in Oregon and Washington. These vessels were not permanently located at any one place. In the following quotation from Union Transit Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36, the federal Supreme Court indicates that the presumption upon which the state relies is virtually confined to intangible personal property:

"There are doubtless cases in the state reports announcing the principle that the ancient maxim of *mobilia sequuntur personam* still applies to personal property, and that it may be taxed at the domicil of the owner, but upon examination they all or nearly all relate to intangible property, such as stocks, bonds, notes and other choses in action. We are cited to none applying this rule to tangible property, and after careful examination have not been able to find any wherein the question is squarely presented, unless it be that of Wheaton v. Mickel, 63 N. J. Law, 525, where a resident of New Jersey was taxed for certain coastwise and seagoing vessels located in Pennsylvania. It did not appear, however, that they were permanently located there. The case turned upon the construction of a state statute, and the question of constitutionality was not raised. If there are any other cases holding that the maxim applies to tangible personal property, they are wholly exceptional, and were decided at a time when personal property was comparatively of small amount, and consisted principally of stocks in trade, horses, cattle, vehicles and vessels engaged in navigation. But in view of the enormous increase of such property since the introduction of railways and the growth of manufactures, the tendency has been in recent

years to treat it as having a situs of its own for the purpose of taxation, and correlatively to exempt at the domicil of its owner."

Thus, the situs of tangible personal property is determined in the same way as issues concerning the domicile of its owner. The latter does not necessarily determine the situs of the owner's tangible personal property. We realize that the statute with which we are concerned does not theoretically levy an ad valorem tax upon the property itself, but imposes an excise upon the privilege of testamentary transfer. Nevertheless, since the amount of the excise is determined by the value of the property, the tax is, for all practical purposes, a tax upon the property itself. The courts make no distinction, based upon the nature of the tax, in determining the jurisdiction over the property. Thus, in Re Brown's Estate, supra, the court stated: "Respecting jurisdiction over the thing taxed, there can be no distinctions between general property and inheritance taxes." From the state's brief, we quote: "In deciding questions of territorial jurisdiction of taxes, the United States Supreme Court draws no distinction between a property tax and an excise tax such as that in the case at bar. Frick v. Pennsylvania, 69 L. Ed. 1058, 268 U. S. 437, 492."

The state contends that the taxation situs of tangible personal property is determined, apart from presumptions, by the place where its owner permanently places and uses it. While it emphasizes the word "permanent", it concedes that "the decisions only require a showing of 'more or less permanent location.' • • • The facts must show a more or less permanent use or location of the property in that place without immediate intention of removing or disposing of the same." The executors express themselves as satisfied with this test "if the terms are correctly defined." Cooley on Taxation (4th ed.), § 452, states:

"The governing rule as usually stated is that the taxable situs depends on whether the property is 'permanently' within the state. However, in this connection the word 'permanently' is apt to be misleading unless read in connection with the facts of the particular case. It means a more or less permanent location for the time being."

Instead of quoting further from the definitions, we shall examine the facts in all of the decisions which the parties

cite. In Blodgett v. Silberman, supra, the item was "a small amount of cash, $287.48, in bank notes and coin in a safe-deposit box in New York." The deceased had been domiciled in Connecticut and that state contended that the above item "should be treated as attached to the person of the owner and subject to a transfer tax at the domicile." The decision stated:

"To money of this amount usually and easily carried on the person, it is said that the doctrine of *mobilia sequuntur personam* has peculiar application in the historical derivation of the maxim. But we think that money, so definitely fixed and separated in its actual situs from the person of the owner as this was, is tangible property and cannot be distinguished from the paintings and furniture held in the Frick case to be taxable only in the jurisdiction where they were."

In Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, the deceased had been domiciled in Pennsylvania. His estate, besides including real and personal property in Pennsylvania, possessed art treasures known as "the Frick Collection", housed in a building in New York City especially constructed for the purpose. The art collection was worth $13,132,391. A Pennsylvania statute provided that in determining the amount of the tax to be levied at death upon the transfer of property of any person domiciled in Pennsylvania, the value of all of his property, whether in that state or elsewhere, should be totalled. In applying this statute, the Pennsylvania officials included the New York art collection. The federal Supreme Court held that the collection should have been excluded because its situs was in New York.

In City Bank v. Schrader, 293 U. S. 112, 79 L. Ed. 228, 56 S. Ct. 29, Thomas B. Clarke, the deceased, domiciled in New York, owned a collection of pictures which he had loaned in March, 1928, to a Pennsylvania museum. He died in January, 1931. His estate contested a tax which Pennsylvania imposed upon the right of transfer and which was based upon the value of the pictures. In sustaining the tax, the federal Supreme Court declared:

"It does not appear that Clarke ever intended to have the pictures returned to New York at any definite date or upon the happening of any event or at all. * * * The

location of the portraits in Pennsylvania was not merely transient, transitory or temporary, but it was fixed in an established abiding place in which they remained for a long time. Undoubtedly, they became subject to the taxing power of the state. * * * By sending them into Pennsylvania and by his omission to have them returned to New York, and his lack of definite intention ever so to do, Clarke failed to maintain an actual situs in New York and created one for them in Pennsylvania."

In Southern Pacific Company v. Kentucky, 222 U. S. 63, 56 L. Ed. 96, 32 S. Ct. 13, it was held that vessels engaged in the coastwise trade which belonged to the Southern Pacific Company, a Kentucky corporation, were taxable by Kentucky. The vessels called at various ports, but remained in none of them longer than was required to discharge the business in which they were engaged. The court pointed out:

"A ship is not intended to stay in port but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty as to result often in an entire escape from taxation."

We employed the same rule in Callendar Nav. Co. v. Pomeroy, supra.

In Union Refrigerator Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36, the court held invalid a tax imposed by Kentucky upon the entire fleet of 2,000 cars owned by the transit company when it appeared that the number of cars employed in that state in 1897, 1898, 1899 and 1900 was, respectively, 28, 29, 40 and 67. The court declared:

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state, receives none of the protection for which the tax is supposed to be compensation. * * * The argument against the taxability of land within the jurisdiction of another state applies with

equal cogency to tangible personal property beyond the jurisdiction."

See to same effect, State v. Pullman-Standard Car Mfg. Co., 235 Ala. 493, 179 So. 541, 117 A. L. R. 498.

In Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257, 5 S. Ct. 1091, the court sustained a tax levied by Louisiana upon coal shipped from Pennsylvania to New Orleans by plaintiffs, who were domiciled in Pennsylvania. The coal was upon the barges in the Mississippi when Louisiana imposed the tax. All of it was in the possession of the plaintiff's sales agents. The decision states:

"It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day."

In American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 538, 24 S. Ct. 365, it appeared that the company, a manufacturer of steel products, was a New Jersey corporation with a plant located in Chicago, from which it shipped to the Patterson Transfer Company, Memphis, Tennessee, hardware to go into the transfer company's warehouse and eventually to fill the needs of the company's customers in the southwestern states. In sustaining a tax imposed by Tennessee upon the Memphis stock, the decision stated:

"With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the Steel Company, to be sold and delivered as contracts for that purpose were completely consummated."

In General Oil Co. v. Crain, 209 U. S. 211, 52 L. Ed. 754, 28 S. Ct. 475, the court sustained an inspection tax imposed by Tennessee upon the plaintiff, a Tennessee corporation. The court deemed the latter fact immaterial and considered the question of the validity of the tax from the standpoint of the general power of the state to tax. The oil had been shipped to the plaintiff's Memphis plant from its refineries in Ohio and Pennsylvania. The Memphis

plant supplied the plaintiff's customers in the southwestern states. A part of the plant was a tank marked "oil already sold in Arkansas, Louisiana and Mississippi." Oil placed in it had already been sold to customers in those states and remained in the tank only long enough for reshipment. Another tank was marked "oil to be sold in Arkansas, Louisiana and Mississippi." Its contents were designated by that title. The controversy concerned the oil in those tanks. In sustaining the tax, the court declared:

"The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation • • • it required storage there—the maintenance of the means of storage, of putting it in and taking it from storage."

Bacon v. Illinois, 227 U. S. 504, 57 L. Ed. 615, 33 S. Ct. 299, sustained the validity of a tax imposed by Illinois upon a quantity of grain which the plaintiff, a broker and resident of that state, had stored temporarily in a Chicago grain elevator. The grain had been grown outside of Illinois and its growers had effected arrangements with the railroads for its carriage to states beyond Illinois; subject to the privilege, however, of removing it from the cars in Chicago for the purpose of inspection, weighing, cleaning, sacking, etc. While the grain was in transit to Chicago, the plaintiff purchased it and succeeded to the rights just indicated. He removed it to his elevator, and while it was there Illinois imposed the challenged tax. The decision said:

"He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation."

Minnesota v. Blasius, 290 U. S. 1, 78 L. Ed. 131, 54 S. Ct. 34, sustained a tax levied by Minnesota upon 11 head of

cattle which the plaintiff, a trader in livestock, had in pens in a St. Paul stockyard. These cattle had been raised outside of Minnesota and had been shipped by their owners to the stockyards for sale. The plaintiff purchased them from commission merchants on April 30, 1929. The tax was assessed May 1, 1929, on which day the plaintiff sold seven of the cattle to a nonresident purchaser who immediately shipped them outside of Minnesota. The following day the remaining four were sold. While the plaintiff owned the cattle he kept them in pens leased by him from the stockyards company. He claimed that the tax violated the interstate commerce clause. In rejecting this contention, and in holding that the cattle were subject to taxation by Minnesota, the decision pointed out that the property had come to rest within the state of Minnesota, and that the plaintiff could there do with it as he pleased. It stated:

"He could sell the cattle within the State or for shipment outside the State. He placed them in pens and cared for them awaiting such disposition as he might see fit to make for his own profit."

In Snodgrass' Estate, 22 Pa. D. & C. 598, the decedent, who was domiciled at the time of his death in Pennsylvania, had spent the last nine winters of his life in California. In the spring of 1930, due to enfeeblement, he did not return to Philadelphia, and died in California August 4, 1930. At the time of his death there was found in a California safe-deposit box, which he had rented December 4, 1929, $89,500 in paper money, and in his room $326.66. The court held that all of this was tangible personal property, having a situs for purposes of inheritance taxation in California.

The above constitutes a review of all of the authorities cited by the parties showing facts which the courts have held determine the taxation situs of tangible property. It is apparent that if such property must gain a permanent location in the state before its taxation can become valid, much of it would never be taxed for the reason that much of it never gains a permanent abiding place. Real property, being immovable, of necessity, has a permanent location. But tangible personal property, such as federal bank notes, may wander into every state in the Union before final retirement. Bank notes and other forms of money achieve a high degree of velocity as they discharge the demands of commerce. We repeat, if tangible personal property could

not be taxed until it had found a permanent abiding place much of it would escape taxation altogether; in fact, by occasionally moving across state lines all of it would fare well. But if such property is subject to taxation in whatever state has, for the time being, become its home or headquarters, that is, the place where its present owner principally uses or keeps it, then we are keeping abreast of present commercial practices. The above-reviewed decisions indicate that Cooley in his above quoted language, was guilty of no misstatement when he said that "permanent situs" as employed in connection with property of this kind "means a more or less permanent location for the time being." The terms "permanent" and "more or less permanent" are important to avoid taxation of such property in more than one state. When property of this kind is more or less permanently located in a state, other than that of the domicile of its owner, it is not taxable in the latter. The residence of the owner may throw light upon issues concerning the place where he generally uses or keeps the property; or indicate whether it is kept permanently or only temporarily in the tax-levying state. His residence is immaterial if it appears that the property has gained an actual situs within the tax-levying state. It is not necessary that both the owner and the property should be located in the state which has imposed the tax. In our belief, the place where the property's owner principally keeps or uses it constitutes for it a sufficient situs for taxation purposes.

In the present instance, the federal reserve notes were permanently in Illinois during Dr. Hayes' ownership of them. No one ever acquires such property or any other form of paper money with any thought of holding it for extended periods of time. Dr. Hayes never intended that the notes should leave Illinois during his ownership. At his request they were placed in his vault by his bank. Clearly, it cannot be said of them that they were merely temporarily out of Oregon—Dr. Hayes, as just indicated, never had any intention of bringing them into Oregon. The period of his ownership was brief, possibly no longer than five days, but in Brown v. Houston, supra, American Steel & Wire Co. v. Speed, supra, General Oil Co. v. Crain, supra, Bacon v. Illinois, supra, and Minnesota v. Blasius, supra, the period of time was also brief. In the latter case it was a matter of only a few hours. We realize that in those cases the courts were primarily concerned with the interstate com-

merce clause of the federal constitution. Nevertheless, each decision sustained a property tax. They involved issues not merely concerning interstate commerce but also of taxation situs. In Snodgrass Estate, supra, a few months sufficed to give a very large sum of money a taxation situs in California. In Blodgett v. Silberman, supra, the period of time is not stated in the opinion in months and days, but may have been very brief. However, time is not the only element. An equally important factor is whether the property was placed in the taxing state by its owner, there to render to him service of a substantial character. In the present instance, the notes rendered in Illinois the only usefulness which they ever performed for Dr. Hayes. They enabled him to transfer to the trustee something of a definite value, incapable of price fluctuation, in a form which the trustee, under the supervision of the beneficiaries of the trust, could readily convert into securities possessing the qualities which both trustee and beneficiaries preferred.

In all of the above decisions the tax was sustained when it appeared that (1) the property had come to rest within the state which levied the tax; (2) its owner intended it to remain there for the time being; and (3) while within that state it performed for him the service which he expected of it. Those three qualities subjected the property to the tax. In the present instance, none of those elements is present in favor of Oregon, since (1) the property was never in this state; (2) its owner never intended it should enter this state; and (3) it performed no service for him here.

Small sums of money carried about on one's person may readily be presumed to have their situs in the domicile of the owner. In that respect they are no different from the ring which he wears upon his finger or the watch in his vest pocket. But forty-five ten-thousand-dollar bills certainly do not fall into this category; especially not when they were acquired in another state for the purpose of transferring them to a bank in that state, to be followed later by their conversion through the bank, as trustee, into permanent investments. It is not difficult to assume that such bills employed in such transactions may acquire for themselves an independent situs.

Had Dr. Hayes purchased, instead of federal reserve notes, some of the refrigerator cars described in Union Refrigerator Co. v. Kentucky, supra, and had used them in

Illinois for a period of five days or so, with no thought of taking them out of Illinois, their situs in that state would have been more evident; and yet the legal character of cars is no different from that of these notes.

Before arriving at a conclusion, let us take note of the other facts. Apparently Dr. Hayes had not made his fortune in this state. He came here as a retired physician and after the present economic depression had begun to shrink values of all securities. He kept in Illinois the only bank account mentioned in the stipulation and most of his securities. It was some of these securities, the bank account and money borrowed from the Illinois bank which made up the fund for the purchase of the notes. In other words, none of the money came from Oregon and none of it had ever been here. His stocks and bonds were intangibles, and property of that kind is generally said to have its situs at its owner's domicile. The rule just mentioned had its origin before the volume of notes, stocks, bonds, accounts receivable, etc., had achieved their present proportions and was formulated when most personal property, apart from the owner's livestock, was closely identified with his person; that is, it consisted principally of his jewels, apparel, furniture and trinkets. However, stocks, bonds, notes and accounts receivable may be more clearly identified with their owner's business than with his person; that being true, the courts have begun to speak of the "business situs," or the "commercial domicile" of intangibles, especially when they have become a part of a business. In such instances the law of the place where they are kept and used may determine their taxation: Wheeling Steel Corp. v. Fox, 298 U. S. 193, 80 L. Ed. 1143, 56 S. Ct. 733, and State Deposit & Trust Co. v. Virginia, 280 U. S. 83, 74 L. Ed. 180, 50 S. Ct. 59. We shall make no attempt to determine whether the situs of the intangibles which provided the source of payment for the tangibles was in Illinois or in Oregon. We assume that it was in the latter place; and have dwelt upon the proceeding only for the purpose of showing that, since Dr. Hayes kept his securities in Illinois, a belief that he intended to keep his tangibles in the same place is greatly fortified.

But the state, impliedly admitting that Dr. Hayes' course of action conferred an actual Illinois situs upon the notes, if his purpose was honest, claims that he intended to escape taxation, and that, therefore, his purpose was defeated.

The court in State v. Pullman-Standard Car Mfg. Co., supra, in which a foreign corporation had formed a local corporation for the purpose of reducing its Alabama franchise tax, states:

"'A taxpayer may resort to any legal method available to him to diminish the amount of his tax liability.' And in Gregory v. Helvertin, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, 97 A. L. R. 1355, 'The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.' That is exactly this situation. This taxpayer has simply and only set itself up in conformity to the law and proposes to pay the taxes which the law says are payable when so set up. The State cannot complain when the taxpayer resorts to a legal method available to him to compute his tax liability. The State is now saying to him that although you did what we said you could do with a certain result, that result is more beneficial to you than we intended. This Court cannot change the law as thus made by our Constitution and statutes."

Certainly, if a taxpayer marries to reduce his taxes, his purpose will not be defeated nor will the marriage become invalid. He may for the same reason change his residence or the nature of his investments. Should he neglect to collect his accounts receivable in order to lessen his tax, his purpose will succeed notwithstanding the fact that the tax collector deplores the result. The taxpayers' success in each of the above instances would be due to the fact that he had done nothing unlawful. Purpose never renders a course of action unlawful if the law blazes the course.. The following is taken from Cooley on Taxation (4th ed.) § 548:

"Likewise if the owner of personalty changes it into real estate, and then executes leases for years thereon in order to avoid taxation on such personalty, the assessment must nevertheless be governed by the legal position of the property at the time it is made. In each of these cases the party is merely exercising a right which the law allows to him; he may choose his own place of residence at pleasure, and he may select, as seems most for his interest, between taxable and non-taxable property; and it is no concern of others, or even of the state which by its laws allows the choice, what may be the motive on which he acts . . .

On the other hand, taxation cannot be avoided (1) by a plan in itself unlawful or (2) by a plan lawful in itself, not actually carried out, which is a mere subterfuge to escape taxation. If the transaction is merely a temporary change of property from nonexempt into exempt property, made shortly before the assessment, with the intent of restoring the property to its original form after the assessment, there is such fraud as warrants taxation of the property; * * *"

Shotwell v. Moore, 129 U. S. 590, 32 L. Ed. 827, 9 S. Ct. 362, is the decision upon which Cooley principally relies to support the sentence last quoted. In it the taxpayer, a day or two before the second Monday of April (the tax listing day) of the years 1881, 1882, 1883, 1884, and 1885, had on deposit in a bank in Ohio the following sums, respectively, $30,900, $26,900, $29,500, $18,560 and $4,700. Each year just before tax listing day he checked out his balance and received greenbacks which he placed in an envelope and handed to the cashier, who placed it in the bank's vault. A day or two later the taxpayer accepted the return of the envelope and redeposited the money. He did this for the purpose of escaping taxation since bank balances were taxable but greenbacks were exempt. The statute provided: "Each person required to list property shall annually * * * on the day preceding the second Monday of April" list his property; but another section of the same statute taxes "the monthly average amount or value for the time he held or controlled the same * * * of all moneys, credits or other effects, within that time invested in or converted into bonds or securities of the United States * * *." The court held that Shotwell was taxable upon the monthly averages which he had converted into greenbacks. He escaped taxation upon the bank balances, but in so doing subjected himself to the result just mentioned.

Dr. Hayes' plan was lawful. It contemplated the conversion of his bonds into federal reserve notes and the transfer of the latter to a trustee which he empowered to invest the trust res under the supervision of the beneficiaries. No one contends that this plan was unlawful. Dr. Hayes, therefore, met the first test suggested by Cooley. His plan was carried out. The state admits that the bonds were sold, cash was raised and federal reserve notes to

the extent of $450,000 were purchased. Then the trust indenture was drafted and signed, and, finally, the trustee proceeded with the performance of its duties. Accordingly, both tests have been met. The state relies upon Poppleton v. Yamhill County, 8 Or. 337, and Shotwell v. Moore, supra. In the first of these, the plaintiff, a resident of Yamhill county, owned notes and mortgages aggregating $12,209.25, which, in order to invalidate a tax, he claimed he had pledged to two individuals in Multnomah county as security for a loan of $1,000. He argued that his securities were not assessable by Yamhill county. The county contested the good faith of the transaction, and its equalization board, after a hearing in the course of which Poppleton submitted his evidence, found that the transaction was not consummated in good faith. This court, in holding that substantial evidence supported the board's findings, pointed out that obviously Poppleton could not have been in need of money when he purportedly borrowed $1,000 because at that time he was loaning money to others; that $12,000 security for a debt of $1,000 indicated that the transaction was not genuine, and that after he had made the pledge he still retained control over at least one of the mortgages. In other words, the evidence indicated that the alleged transaction concerning the mortgages had never taken place. We reviewed Shotwell v. Moore in the preceding paragraph.

Certainly, the state has pointed out to us nothing unlawful which Dr. Hayes did. That being true, the mere fact that he planned to lessen the taxes collectible upon his estate no more tainted his transaction with illegality than if he had discontinued the drinking of tea in order to avoid the payment of a tax upon it. To have defeated his purpose it would have been necessary either that he have done something which was unlawful, and which, therefore, never could achieve a result cognizable by the courts, or that he have failed to carry through his plan to a consummation. Neither of these alternatives took place and, therefore, the illegality upon which the state depends is not present.

We now express our conclusion. Since neither the securities nor the cash which made up the fund for the purchase of the federal reserve notes was ever in Oregon, and since the notes were not brought into this state, but remained in Illinois during Dr. Hayes' ownership of them, performing there the only service which they ever rendered to him, their taxation situs was in Illinois.

We deem it immaterial whether or not a tax was levied upon the notes in Illinois. The fact concerning that matter is not disclosed by the stipulation; but the situs of the notes does not depend upon the taxation laws of other states.

The remaining issue is: Was Donald Hayes McGraw, the legally adopted son of Dr. Hayes' daughter, the "lineal descendant" of Dr. Hayes. Section 10-603, Oregon Code 1930, after graduating according to the size of the estate, the amount of the tax, says:

"The above tax on the estate shall be in full of all inheritance tax on any device • • • gift • • • which shall pass to or for the use or benefit of any grandfather, grandmother, father, mother, husband, wife, child, stepchild or any lineal descendant • • •."

Beneficiaries who are not included within the designations just mentioned are subject to collateral tax. Section 33-407, which is a part of our laws governing the adoption of children, provides:

"A child so adopted shall be deemed, for the purposes of inheritance of such child, and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them by lawful wedlock; except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parent by adoption, nor property from the lineal or collateral kindred of such parents by right of representation."

Section 10-104, which is a part of our laws of descent and distribution, is in the precise words of the paragraph just quoted. The executors contend that these sections of our laws made Donald the lineal descendant of Dr. Hayes. In other words, they made Donald, according to the executors, Dr. Hayes' grandchild. Vol. 1, Am. Jur., Adoption of Children, § 63, after taking note of the fact that the statutes, giving an adopted child rights to inherit, have not received uniform construction, states:

"It is the general view that there is not conferred upon the child a right to inherit from the lineal or collateral kindred of the adoptive parent unless the language of the statutes is clearly to that effect."

Vol. 2, C. J. S., Adoption of Children, § 63d, states:

"Under the principle that a stranger to the adoption proceedings who has never recognized the existence and the artificial relation created thereby should not have his property diverted from the natural course of descent without a clear expression of such intent, it is generally held that a right to inherit through an adoptive parent, from collateral kin of the latter, is not to be readily implied from the relation, and is to be recognized only if expressly conferred. Accordingly, in the absence of such express provision, it is generally held that an adopted child cannot inherit from the ancestors of the adoptive parent, nor from natural children of such parent, nor from collateral kindred, and this has been held even through the statute expressly provided that the child should inherit through the adoptive parent as fully as if he were a natural child."

From Re Bradley, 185 Wis. 393, 201 N. W. 973, 38 A. L. R. 1, we quote:

"Text-writers generally lay down the rule that under statutes of adoption which declare the adopted child to have all the rights, including that of inheritance, of a child born in lawful wedlock, the adopted child is not constituted an heir of the collateral kindred of the adoptive parents. 1 R. C. L. p. 621; 1 C. J. p. 401; Spencer, Dom. Rel. 422; 3 Thomp. Real Prop. pp. 398, 399; 1 Woerner, Administration, p. 204. This has been held in many cases, among which we cite the following: * * *"

Vol. 1, Am. Jur., Adoption of Children, § 63, states further:

"According to the weight of authority, under a statute placing an adopted child upon an equality with natural children for the purpose of inheriting from the adopting parents, the adopted child, for other purposes, is unlike children by birth, and hence such child has no right of inheritance through his adopted parents."

The following three decisions bestowed painstaking labor upon issues similar to the problem that confronts us: Re Bradley, supra; Durkee v. Batcheller, 39 R. I. 45, 97 Atl. 378, L. R. A. 1916E 545; Hockaday v. Lyn, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9

Ann. Cas. 775. These decisions, together with the two texts from which we quoted above and the annotation in 38 A. L. R., p. 8, cite all of the authorities which have come to our attention. The three decisions review virtually all of the authorities.

In Durkee v. Batcheller, supra, the court was confronted with a statute exactly like §§ 10-104 and 33-407, Oregon Code 1930, with the exception of a single proposition, an immaterial circumstance. The court held that the statute conferred upon the adopted child only the right of inheritance from its adoptive parents, and that it did not enable him to inherit through them. Construing the effect of the exceptions mentioned in the statute and the adopted child's contentions concerning them, the decision stated:

"We rather deduce the contrary inference from this language—that it is more in denial than in allowance of inheriting directly from the kindred of the adopting parents. This clause is introduced by way of exception from what had before been granted—the right of inheritance; and, as by our interpretation the right so given is to inherit from the adopted parents only, the exception is to the right of inheriting from or through the adopting parents, the provision being, in meaning, that the adopted child shall not be deemed so much a child of the adopted parents that he can, as their representative, inherit from their kindred, lineal or collateral. If, then, as being the adopted child, such child be not permitted to represent and stand in the place of the adoptive parent, and take by representation from the kindred of such parent, it would seem that much more he should not take directly from such kindred. This whole excepting clause at the close of the 5th section is pointed to inheriting from or through the adoptive parents, the first branch of it being that the adopted child shall not take property expressly limited to the body or bodies of the parents by adoption, and the second that he shall not take property from the lineal or collateral kindred of such parents by right of representation. The language is all restrictive of inheriting from or through the adoptive parents, and an adopted child being made, 'to all legal intents and purposes, the child' of the adopting parent, there would seem to be the more reason that, as representing and standing in the place of the adoptive parent, he should take by right of representation from such parent's kindred than that he should take directly from such kindred; and any implication there may be from

the prohibition to take by right of representation should rather be against than in favor of the right to take directly."

We concur in those views. In Keegan v. Geraghty, 101 Ill. 26, a statute, in all of its essentials similar to ours, was held to confer a right of inheritance only from the person adopting and not from the lineal or collateral kindred of the adopting parent.

We cannot hold that Donald's share is rendered exempt by the above statute unless we believe that he is a lineal descendant of Dr. Hayes; in other words, believe that when the latter's daughter adopted Donald she thereby made him the adopted grandson of her father, and conferred upon him the rights of a lineal descendant of the purported grandparent. Parents adopt a child voluntarily; the relationship, although governed by statute, is contractual. All who are strangers to the contract are free from its consequences unless the statute renders them subject to its terms. Undoubtedly, the primary purpose of adoption statutes is, as stated in Durkee v. Batcheller, supra, "to promote the welfare of children by securing to them the benefits of a home and parental care." That being true, the adoption imposes upon the parents and the child the same duties, obligations and rights within the family circle as if the child had been born to his adoptive parents in lawful wedlock.

It is, however, a tenet of natural justice, favored by our social system and our jurisprudence from feudal days, that the property of intestates descends to kindred of his blood; and even our law of wills favors the same principle by rendering wills invalid which wholly ignore the children. Anyone who seeks to set aside a principle so interwoven through our entire social system must point to statutory words of no doubtful meaning. The statute must leave no reasonable alternative. The consequences of the interpretation which the executors submit would be momentous. Such an interpretation would allow the adoptive parents not only to choose a child for themselves, but a relative, possessed of inheritable rights, for all of their kin.

It is our opinion that adoption under the sections of our code above mentioned created a relationship personal between the adoptive parents and the child. It does not make the latter a lineal descendant of the adopting parents. In addition to the authorities already cited, we add: The Estate

of Sunderland, 60 Iowa 732, 13 N. W. 655; and State v. Goettleman's Estate, 192 Iowa 808, 185 N. W. 462.

It follows from the above that the order of the circuit court pertaining to the interest of Donald Hayes McGraw is affirmed. The part which imposes a tax upon Trust Number One is in error. The cause will be remanded for the necessary modifications.

Rand, C. J., and Kelly, J., concur.

BAILEY, J. (dissenting in part):

In my opinion, Donald Hayes McGraw, the legally adopted son of Ruth Hayes McGraw, daughter of Dr. Hayes, was not the lineal descendant of Dr. Hayes within the meaning of § 10-603, Oregon Code 1930. Therefore, I concur in that part of the opinion of the majority of the court that so holds.

It is impossible, however, for me to concur in the view expressed by the majority of the court that so much of the estate of Dr. Hayes as went to make up the $450,000 constituting the Edward Stephen Hayes trust No. 1 is not subject to the inheritance tax law of the state of Oregon. In this connection it must be borne in mind that the stipulation is to the effect that this trust was created by Dr. Hayes in contemplation of death.

The trust instument is dated August 15, 1935. On August 8 of that year Dr. Hayes had with the Harris Bank of Chicago, Illinois, bonds of the par value of $691,000, which bonds had a market value of not less than $625,000. On or about that date Dr. Hayes instructed the Harris bank to sell and liquidate sufficient of the said bonds owned by him and held by the bank as his agent to make up a sum which together with cash balances in his account with the Harris bank would equal $450,000. At that time Dr. Hayes had a balance in excess of $90,000 in his checking account with the Harris bank.

On August 12, 1935, the Harris bank sold in the open market bonds belonging to Dr. Hayes, realizing therefrom $176,062.01, and on the same day Dr. Hayes borrowed from that bank on a demand promissory note the sum of $183,937.99, which amount added to the sum realized from the sale of bonds on that date totaled $360,000. This, together with the $90,000 in his checking account, made up $450,000. The amount which Dr. Hayes borrowed from the bank was all repaid on or before August 29, 1935.

My view of the matter is that this method adopted by Dr. Hayes was a mere subterfuge to escape payment to the state of Oregon of inheritance tax on a large part of his estate. The transfer of that $450,000 by Dr. Hayes could have been made much more simple and direct by giving the bank a check on his checking account and having the money loaned to him turned over to the trustee, rather than purchasing federal reserve notes, placing them in a safety deposit box rented by him for a few days and then transferring them to the trustee to make up the amount of the trust fund.

The majority opinion quotes from Cooley on Taxation, 4th Ed., § 548. The latter part of the excerpt reads thus: "On the other hand, taxation can not be avoided (1) by a plan in itself unlawful or (2) by a plan lawful in itself, not actually carried out, which is a mere subterfuge to escape taxation. If the transaction is merely a temporary change of property from non-exempt to exempt property, made shortly before the assessment, with the intent of restoring the property to its original form after the assessment, there is such fraud as warrants taxation of the property". Although the purchase of the said federal reserve notes by the Harris bank at the instance of Dr. Hayes was in itself lawful, the method adopted in creating this trust fund was, in the language of the text-writer, merely a temporary change of intangible property to tangible property, without any intent to have it retain the latter form, and was merely a subterfuge to avoid payment of inheritance taxes to the state of Oregon on the property involved.

The effect of the majority opinion is to render it extremely simple for a resident of Oregon having a large estate to avoid the payment of inheritance taxes to the state. All that is necessary to defeat the Oregon inheritance tax law is to buy federal reserve notes, rent a safety deposit box in Washington, Idaho, California, or any number of states, place the notes in such box or boxes, and then turn the said notes over to a trustee or trustees for reinvestment in intangibles.

By adopting the method of avoiding the Oregon inheritance tax resorted to in the case at bar, it may be possible for an estate to escape payment of inheritance taxes in any state, for the reason that the states wherein trusts are created may not be advised that they are established in contemplation of death. But even if taxes are paid in such states, the aggregate amount of taxes will be much less than if

payable wholly in one state, inasmuch as the higher rate of taxation on the greater part of the estate will be avoided.

For the reasons herein stated, I dissent from the opinion of the majority of the court.

Be it Remembered, That at a regular term of the Supreme Court of the State of Oregon, begun and held at the Supreme Court room in the City of Salem, on Monday, the 3rd day of October, 1938, the same being the First Monday in said month, at the time fixed by law for holding a regular term of said court, there were present:

John L. Rand, Chief Justice; George Rossman, Associate Justice; Percy R. Kelly, Associate Justice; Harry H. Belt, Associate Justice; Henry J. Bean, Associate Justice; J. O. Bailey, Associate Justice; Hall S. Lusk, Associate Justice; Arthur S. Benson, Clerk.

Whereupon, on this Tuesday the 17th day of January, 1939, the same being the 30th judicial day of said term of court, among other proceedings the following was had, to wit:

Dept. No. 1

In the Matter of the Estate of Edward Stephen Hayes, Deceased

Ruth Hayes McGraw and Edmund Hayes, as Executors of the Last Will and Testament of Edward Stephen Hayes, Deceased, and as Individuals, Appellants,

vs.

Rufus C. Holman, State Treasurer of the State of Oregon, Respondent

Appeal from Multnomah County

This cause on October 7, 1938, having been duly tried, argued and submitted upon and concerning all questions arising upon the transcript, record and evidence and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is partial error as alleged in that part of the decree which imposes

a tax upon Trust Number One and in all other respects the decree of the court below is affirmed.

It is further ordered that the appellants recover of and from respondent their costs and disbursements in this court taxed at $—.

It is further ordered that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree with the necessary modifications in accordance with the opinion of the court herein.

Supreme Court, State of Oregon. Filed Feb. 4, 1939.
Arthur S. Benson, Clerk

IN THE SUPREME COURT OF THE STATE OF OREGON, MARCH TERM, 1938

In the Matter of the Estate of EDWARD STEPHEN HAYES, Deceased

RUTH HAYES McGRAW and EDMUND HAYES, as Executors of the Last Will and Testament of Edward Stephen Hayes, Deceased, and as Individuals, Appellants,

vs.

RUFUS C. HOLMAN, State Treasurer, Respondent

MOTION BY RESPONDENT FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING

Comes now the respondent and moves the Court for an order granting respondent additional time up to and including February 20, 1939, within which to file petition for re-hearing in the above entitled cause.

This application is made in good faith and not for purpose of delay, and is based upon stipulation of the parties and affidavit of Dean H. Dickson, one of respondent's attorneys.

(Sgd.) Dean H. Dickinson, of Attorneys for Respondent.

Portland, Oregon, February 3, 1939.

Due service of the within motion and affidavit and receipt of copies thereof certified by counsel for respondent is hereby acknowledged.

(Sgd.) Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Appellants.

It is now ordered that additional time be granted to and including Feb. 20, 1939, in which to serve and file petition for Rehearing.

Date 2-4-39.

(Sgd.) John L. Rand, Chief Justice.

IN THE SUPREME COURT OF THE STATE OF OREGON, MARCH TERM, 1938

In the Matter of the Estate of EDWARD STEPHEN HAYES, Deceased

RUTH HAYES McGRAW and EDMUND HAYES, as Executors of the Last Will and Testament of Edward Stephen Hayes, Deceased, and as Individuals, Appellants,

vs.

RUFUS C. HOLMAN, State Treasurer, Respondent

AFFIDAVIT IN SUPPORT OF RESPONDENT'S MOTION FOR EXTENSION OF TIME FOR FILING PETITION FOR REHEARING

STATE OF OREGON,
County of Multnomah, ss:

I, Dean H. Dickinson, being first duly sworn on oath depose and say; that the above entitled cause is of importance to the State of Oregon and respondent desires to petition this Court for re-hearing therein; that I am one of respondent's attorneys and am in immediate charge of preparation of said petition for re-hearing. Because of pressure of other business including preparation for trial of cases in the Circuit Court for Multnomah County, it has been impossible for me to complete the preparation of printing, service and filing of respondent's petition and brief for re-hearing herein, within twenty days from the date of filing of the Court's decision. To permit adequate preparation of said petition and brief, it is necessary that the time, therefore, be extended to and including February 20, 1939; that respondent's motion is made in good faith and not for purpose of delay.

(Sgd.) Dean H. Dickinson.

Subscribed and sworn to before me this 3rd day of Feb., 1939. (Sgd.) M. I. Gustofson, Notary Public for Oregon. My comm. expires 3/10/41. (Seal.)

IN THE SUPREME COURT OF THE STATE OF OREGON, MARCH TERM, 1939

In the Matter of the Estate of EDWARD STEPHEN HAYES, Deceased

RUTH HAYES McGRAW and EDMUND HAYES, as Executors of the Last Will and Testament of Edward Stephen Hayes, Deceased, and as Individuals, Appellants,

vs.

RUFUS C. HOLMAN, State Treasurer, Respondent

STIPULATION CONSENTING TO EXTENSION OF TIME FOR FILING RESPONDENT'S PETITION FOR REHEARING

It is Hereby Stipulated, between appellants and respondent in the above entitled cause by and through their respective attorneys, that respondent may have to and including February 20, 1939, within which to complete and file respondent's petition for rehearing herein.

Dated February 3, 1939.

(Sgd.) Dean H. Dickinson, of Attorneys for Respondent. (Sgd.) Charles E. McCulloch, Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Appellants.

Supreme Court, State of Oregon. Filed Feb. 4, 1939. Arthur S. Benson, Clerk

IN THE SUPREME COURT OF THE STATE OF OREGON, MARCH TERM, 1938

In the Matter of the Estate of EDWARD STEPHEN HAYES, Deceased

RUTH HAYES McGRAW and EDMUND HAYES, as Executors of the Last Will and Testament of Edward Stephen Hayes, Deceased, and as Individuals, Appellants,

vs.

RUFUS C. HOLMAN, State Treasurer, Respondent

MOTION FOR SUBSTITUTION OF PARTY RESPONDENT

Comes now Dean H. Dickinson, one of respondent's attorneys in the above entitled cause, and moves that Walter

E. Pearson, now Treasurer of the State of Oregon, be substituted in his official capacity as respondent in this case in place of Rufus C. Holman, formerly State Treasurer of the State of Oregon.

(Sgd.) Dean H. Dickinson, of Attorneys for Respondent.

Portland, Oregon, February 3, 1939.

This certifies that appellants acknowledge due service of the foregoing motion and receipt of a copy thereof certified by counsel for respondent and that appellants consent to the allowance of said motion.

(Sgd.) Fletcher Rockwood, Carey, Hart, Spencer & McCulloch, Attorneys for Appellants.

It is ordered that the above motion for substitution of party respondent be and is granted.

Dated this 4th day of February, 1939.

(Sgd.) John L. Rand, Chief Justice.

[fol. 195] [File endorsement omitted]

[fol. 196] IN SUPREME COURT OF OREGON

RESPONDENT'S PETITION FOR REHEARING WITH BRIEF—Filed Feb. 18, 1939

To the Honorable Supreme Court of the State of Oregon:

Comes now the Respondent, Walter E. Pearson, State Treasurer of the State of Oregon, by his attorneys, I. H. Van Winkle, Attorney-General, and Dean H. Dickinson, and petitions this Court for a rehearing in this cause, and as reasons therefor alleges:

1. That the Court erred in holding that the federal reserve notes which were the subject matter of the gift [fol. 197] sought to be taxed in this case had no situs for taxation in the State of Oregon.

2. That the Court erred in finding and holding that the federal reserve notes had a situs for taxation in the state of Illinois in the hands of this decedent.

3. That the Court erred in holding that imposition of inheritance tax by the State of Oregon on the transfer of said notes deprived Appellants of their property without due process of law in contravention of the 14th Amendment of the United States Constitution.

Respectfully submitted, I. H. Van Winkle, Attorney-General, Dean H. Dickinson, Attorneys for Respondent.

STATE OF OREGON,
County of Multnomah, ss:

I, Dean H. Dickinson, being first duly sworn say; that I am one of the attorneys for Respondent in the above entitled [fol. 198] cause and do hereby certify that in my judgment the foregoing petition is well founded and that said petition is not interposed for delay but in order that justice may be done.

Dean H. Dickson.

Subscribed and sworn to before me this — day of February, 1939. R. A. Imlay, Notary Public for Oregon.

My commission expires Oct. 29, 1939.

Only twice has the State of Oregon ever filed petition for rehearing of an inheritance tax case. But the decision in the case at bar is so far reaching in its effects, and will result in such a blow to the inheritance tax revenue that the State Treasurer feels it his duty to respectfully urge reconsideration of this case. The State Treasurer is impelled to believe that the Court may not have fully appreciated the results which will inevitably follow its decision, and hence will discuss these effects before proceeding to the errors assigned.

This is not a mere isolated case wherein a reversal of the lower Court only means that Appellants gain, and that the State loses $80,000. That sum is in itself not inconsiderable, yet its loss is only the beginning. A permanent loophole for evading the inheritance tax has been opened.

Let us summarize the admitted facts of this case:

1. Decedent was domiciled in Oregon.

2. He was seventy-nine years of age and retired from all active business.

[fol. 200] 3. His bodily and mental condition were such that he was contemplating death and not continued life or further business activity.

4. By August, 1935, he had abandoned the idea of longer using or even holding his property; and had decided to immediately give away practically all of his estate.

5. He determined, if possible, to avoid Oregon inheritance tax on the distribution of his bonds by converting them into paper money and giving away the money in Chicago.

Is it to be held that a decedent can defeat inheritance tax at his domicile by merely converting his liquid estate into paper money at the last moment, and exporting or placing the money beyond the state long enough to stage the gift? If so, it cannot be doubted for a moment that other decedents will avail themselves of this broad avenue for tax evasion. In fact the only ones who cannot use the scheme will be those unfortunates who happen to have their wealth tied up in Oregon real estate or other non-liquid investments. The effect on the revenue will be startling even if only one or two of the more wealthy decedents in a year

[fol. 201] resorted to this device; for on the average about 60 per cent of the inheritance tax comes from a half dozen large estates. Nor will there be any way in which the mischief can be repaired by the Legislative Assembly, since the decision is placed strictly on constitutional grounds.

The fallacy in the decision lies in failing to give any weight to the rule that personal property, tangible as well as intangible, has its situs for taxation at the domicile of the owner, unless and until it is shown to have acquired some "fixed abiding place" or actual "permanent situs" elsewhere; and in holding that physical presence alone is sufficient to establish taxable situs.

If deposit in Chicago for three days, while the instrument of gift was being signed, is sufficient to constitute "permanent situs"—then there is no reason for saying that three hours or three minutes of physical presence would not suffice. Nor will there be any necessity for shipping the money to distant points; its removal to the north end of the interstate bridge for five minutes would satisfy the [fol. 202] requirement just as well.

By further elaboration decedent could entirely escape state inheritance taxes by planting the paper money in blocks of proper size in each of the other forty-seven states so as to be within the exemptions provided in each state.

A consideration of the amazing opportunity for tax evasion opened by the decision leads to the conclusion that certain fundamental principles must have been overlooked by the Court. We respectfully submit that in this case the Court has erred on two important points; first, it has failed to give effect to the presumption that all personal property has its situs for taxation at the domicile of the owner, until it has acquired a fixed abiding place elsewhere; and second, it has held that mere physical presence in a given state at the taxable moment is sufficient to confer jurisdiction to tax.

[fol. 203] THE SITUS FOR TAXATION OF TANGIBLE PERSONAL PROPERTY IS AT THE DOMICILE OF ITS OWNER UNLESS AND UNTIL IT HAS ACQUIRED A SEPARATE TAXABLE SITUS IN SOME OTHER STATE

This rule is not of recent origin but is founded on the well-known maxim of the common law, mobilia sequuntur personam, which from earliest times has assigned to movables the same situs as the person of the owner.

While it is freely conceded that tangibles are often so used, kept or localized in some state other than the domicile of the owner as to acquire an exclusive situs for taxation in that place; that is only an *exception* to the rule, and until such separate situs has been clearly established they remain taxable at the domicile.

This principle of taxation is well stated by the Court in a case dealing strictly with tangibles. In Callender Navigation Co. v. Pomeroy, 61 Or. 343, Justice Burnett says:

"Just as before stated, *unless something else is shown,* [fol. 204] movable property follows the person holding the title to it. It cannot be denied that personal property permanently located by its owner within the boundaries of a state is subject to taxation there, although he may reside elsewhere. The question inevitably narrows down to the determination of the situs of the property.

" 'Situs' or situation imports fixedness of location. In its natural signification the term is applicable only to landed estates which are really fixed and immovable. Conventionally it is applied to personal property as annexing it to the individual to whom it belongs, its situation being primarily, in legal contemplation, where the owner happens to be at any time. *It is the exception that personal property has any other situs than that of the person of its owner.*" (Italics ours.)

Recent cases showing that this rule retains its full vigor are collected in a note to Brock & Co. v. Los Angeles Co., 65 Pac. 2d 791, 110 A. L. R. 700, 713, wherein the author says:

"The operation of the maxim 'mobilia sequuntur personam' is nullified with respect to tangible personal property *only to the extent* such property has acquired a factual, permanent situs elsewhere. It follows that the power of the domicile under that maxim is not abrogated in respect to property which is temporarily absent from its territorial jurisdiction. In short, not until the property acquires an actual situs elsewhere, does the domicile lose the right to tax."

[fol. 205] While the opinion in the case at bar does not directly deny this general presumption that tangibles have their taxable situs at the owner's domicile; nevertheless no

weight is given to it. On the strength of a paragraph quoted from Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 150, the presumption is brushed aside with the statement that it is "virtually confined to intangible personal property". That such a conclusion is not warranted from what was said in the Union Refrigerator Transit Co. case, has been expressly held by the United States Supreme Court in Southern Pacific Co. v. Kentucky, 222 U. S. 63, 56 L. Ed. 96, 100, in which the Court interpreted and limited its own language used in the Refrigerator case:

"It has been urged that the case of Union Refrig. Transit Co. v. Kentucky, 199 U. S. 195, 50 L. Ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493, lays down the principle that jurisdiction to impose taxes upon tangible property is, under the 14th Amendment, *wholly dependent* upon the *actual situs* of the property taxed, and that the fiction which gives movables the situs of the owner for purposes of taxation is inconsistent with that due process of law guaranteed under that Amendment. The question for decision in that [fol. 206] case, as stated in the forepart of the opinion, was, 'whether a corporation organized under the law of Kentucky is subject to taxation upon its property permanently located in other states, and employed there in the prosecution of its business.' The property in question was railroad cars, a kind of movables obviously capable of acquiring a permanent location other than that of the owner. The judgment of the Court was that the taxation of such property so permanently located elsewhere by the law of the domicile of the owner would be a denial of due process of law, and beyond the power of the state. The principle was not a new one, and was declared to rest upon repeated judgments of this court, the cases of Northern C. R. Co. v. Jackson, 7 Wall. 262, 19 L. Ed. 88; Delaware L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, 25 Sup. Ct. Rep. 669, Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. Ed. 513, 23 Sup. Ct. Rep. 463, being cited as precedents. *That judgment did not deny to the state of the domicile of the owner power to tax tangibles which has not acquired an actual situs elsewhere.*" (Italics ours.)

The decision of the Court in the case at bar is stated on page 18 of the opinion in the following language:

"We now express our conclusion. Since neither the securities nor the cash which made up the fund for the pur-

chase of the federal reserve notes was ever in Oregon, and [fol. 207] since the notes were not brought into this state, but remained in Illinois during Dr. Hayes' ownership of them, performing there the only service which they ever rendered to him, their taxation situs was in Illinois."

We note that only three grounds are assigned for denying jurisdiction of the State of Oregon to tax the transfer of this property. They are as follows:

1. That the securities from which the paper money was bought were never in Oregon.

2. That the money itself was not brought into this state.

3. That the notes rendered their only service to Dr. Hayes in Illinois where they remained during his ownership.

By assigning these reasons, and the absence of any other reasons, the Court has made clear that its decision is rested squarely on the physical location of the notes. No weight is given to the fact that decedent was domiciled in Oregon; nor does the Court find that the notes had any fixed abiding place or had obtained any permanent situs in Illinois as far as Hayes was concerned.
[fol. 208] The language used in other portions of the opinion also indicates that mere physical location of the notes in Chicago at the moment of gift was made the decisive test of taxability. On page 12 of the opinion we find:

"It is apparent that if such property must gain a permanent location in the state before its taxation can become valid, much of it would never be taxed for the reason that most of it never gains a permanent abiding place. * * * We repeat, if tangible personal property could not be taxed until it had found a permanent abiding place, much of it would escape taxation altogether; in fact, by occasionally moving across state lines all of it would fare well."

This viewpoint is erroneous in that it ignores the rule that personalty which is always kept on the wing, and never finds a permanent abiding place, is taxable at the domicile under the rule mobilia sequuntur personam. The law of taxation does not countenance the idea that personalty may be kept perpetually rotating in a tax free void so to speak. Tangibles which by their very nature are constantly on the move so as to be incapable of attaining a true fixed situs

anywhere have their situs for taxation at the domicile of their owner.

[fol. 209] The difficulty of situs suggested in the language above quoted is solved by the United States Supreme Court in respect of a tangible fully as ambulatory as paper money. In Southern Pacific Co. v. Kentucky, supra, a Kentucky corporation owned certain steamships which plied between New York, Havana, New Orleans and other ports. These ships had no permanent home. In upholding the right of Kentucky as the state of domicile of the owner to tax them, the Court said:

"Since, therefore, an artificial situs for purposes of taxation is not acquired by the enrollment nor by the marking of a name upon the stern, the *taxable situs must be that of the domicile of the owner*, since *that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere.* The ancient maxim which assigns to *tangibles as well as intangibles*, the situs of the owner for purposes of taxation, has its foundation in the protection which the owner receives from the government of his residence; and the exception to the principle is based upon the theory that if the owner, by his own act, gives to such property a permanent location elsewhere, the situs of the domicile must yield to the actual situs and resulting dominion of another government." (Italics ours.)

The same result was reached by this Court in Callendar [fol. 210] Navigation Co. v. Pomeroy, supra. These cases are particularly applicable to the case at bar because paper money is most analogous in its purpose and functions to ships. Money, like a ship, is created expressly for movement. It circulates from hand to hand, and from place to place in the course of business, just as ships pass from port to port. This attribute of mobility is recognized by the following apt language of the Court in this case:

"But tangible personal property, such as federal bank notes, may wander into every state in the Union before final retirement. Bank notes and other forms of money achieve a high degree of velocity as they discharge the demands of commerce."

We submit that the rule established by the Southern Pacific Co. v. Kentucky case in favor of taxing ships at their

owner's domicile applies with equal reason and justice to paper money.

There is another respect in which the case of Southern Pacific Co. v. Kentucky, supra, answers a point raised in the opinion. The fact that the paper money in our case was never in Oregon while Hayes owned it, is assigned by the Court as the second reason for holding its taxable situs to have been in Illinois. It was similarly urged in the Ken-
[fol. 211] tucky case that the ships had never been in Kentucky, and in fact could never be used there; but the Supreme Court held that this test "was not one for which there is any authority".

It is of no importance whether Hayes obtained the money here and shipped it to Illinois, or used his credit and intangibles to procure the notes at some point outside of Oregon. The important fact is that he did not acquire the notes to enjoy, hold or use in any state, but purchased and placed them in Chicago for the single and final purpose of giving them away.

Now let us consider the first reason assigned for the decision, namely that the securities out of which the cash was realized were never brought to Oregon by Dr. Hayes. It is difficult to see what connection this matter has with the question at bar. The opinion correctly concludes that it was the notes which were given away not the securities, and that, "• • • if any transaction was taxable it was the transfer of these notes from Dr. Hayes to the bank".
[fol. 212] It is said, however, on page 15 of the opinion that

"• • • since Dr. Hayes kept his securities in Illinois, a belief that he intended to keep his tangibles in the same place is greatly fortified.".

Since it is admitted that he obtained the notes merely for the purpose of making an immediate gift, how can it be said that he entertained any intention "to keep" them? It is impossible to fortify an intention which does not exist.

The fact that Dr. Hayes had left most of his stocks and bonds in the hands of a financial agent in Chicago, to clip the coupons, and to buy or sell on his order, is made the ground for discussing whether they might not have thus obtained a "business situs" in Illinois, although the Court assumes the situs was in Oregon. Wheeling Steel Corp. v. Fox, 298 U. S. 193, 80 L. Ed. 1143, is cited.

The bonds converted into cash were merely part of a larger body of intangibles which had been held for Hayes by the Chicago agent for a number of years. Those securities not converted into cash were placed by Hayes into Trust No. 2 [fol. 213] upon which Appellants paid inheritance tax to the State of Oregon without protest. If there had been any basis for claiming business situs for the intangibles in Chicago, Appellants would not have voluntarily paid a $60,000 tax to the State of Oregon. But they did not even make an issue on the point.

Appellants made no claim in their opening brief that the intangibles which were liquidated to obtain the cash had any "business situs" in Chicago. They only bring up the matter in their reply brief as a "make-weight" to cover a glaring absence of any evidence to prove permanent situs in Chicago for the cash.

Nothing is now better settled than that intangibles have their situs for taxation at the domicile of the owner. We cannot improve on the statement of the rule which Appellants themselves made on page 53 of their opening brief:

"3. Intangible personal property.—Intangible personal property of every type can be taxed only by the state of the domicile and no other state has power to tax irrespective of the location of the documents evidencing the intangible rights or of the residence of the debtor, or, in case of corporate stock, of the state of incorporation."

[fol. 214] The facts in Wheeling Steel Corp. v. Fox, supra, render that decision inapplicable to our case. There the state of West Virginia was held to have jurisdiction to tax the accounts and other intangibles of a corporation organized in Delaware but which had its main business office in West Virginia and carried on all of its general business from that state.

The intangibles were held taxable in West Virginia because they arose out of and were an integral part of a business localized in that state. (See Farmers Loan & Trust Co. v. Minn., 280 U. S. 205, 74 L. Ed. 371, 375.)

In our case the money was certainly not an "integral part" of anything except the one act of distributing Hayes' estate.

No cases will be found holding that a man gives his personal fortune a "business situs" in a place apart from his domicile by merely leaving it there in the hands of an agent

for conservation and for investment and reinvestment in market securities. To be taxable at a place other than the domicile intangibles must grow out of or be made an integral [fol. 215] part of some local business. Blodgett v. Silberman, 277 U. S. 1, 72 L. Ed. 749. Hackett v. Banker's Trust Co., 122 Conn. 107, 187 A. 653. Manufacturer's Trust Co. v. Hackett, 118 Conn. 207, 158 A. 245.

If the securities which Hayes liquidated to procure the paper money had possessed a "commercial domicile" in Chicago, this fact might have had some bearing on the situs of the notes. But since the Court assumes that the taxable situs of the securities was in Oregon that argument drops out of the case.

[fol. 216] Permanence of Situs

As a third reason for holding the situs of the notes to have been in Illinois the Court says that their only service for decedent was performed in the state of Illinois. The service rendered was not to make possible the gift, for Hayes could just as well have given the bonds themselves. The only reason for converting his capital into money was to put the subject matter of the gift into tangible form long enough to hand it to his trustee. It is just as though Hayes had owed a debt to a resident of Illinois payable in currency, and had gone to Illinois, sold bonds to obtain the money and then died while on the way to his creditor's office. Could Illinois claim inheritance tax in such a case, or assert that the money had a fixed abiding place in his hands in Illinois? Or suppose the assessor of Cook County, Illinois, hearing of the transaction stepped up as soon as Hayes drew the paper money and assessed him for an ad valorem tax thereon. Could the tax be sustained merely on the ground that the money was physically in his hands in that state?

[fol. 217] The law requires that tangible personal property be used or kept with some degree of permanence in a state other than the owner's domicile before it loses its situs for taxation at the domicile and obtains a taxable situs in the other state. On this point the cases are collected in 42 A. L. R. 326, 328, in a note to Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058. The author says:

"The principle of the Frick case doubtless presupposes some degree of fixedness of permanency in the location of the tangibles in a state other than the owner's domicile,

rendering it inapplicable to tangibles temporarily or transiently in such state."

In the last extension to the above note 110 A. L. R. 700, 717, the later cases are discussed and the conclusion is the same:

"The Courts are all agreed that before tangible personal property may be taxed in a state other than its owner's domicile, it must acquire there a location more or less permanent. It is difficult to define the idea of permanency that this rule connotes. It is clear that 'permanency', as used in this connection, does not convey the idea of the permanency of real estate. It merely involves the concept of being associated with the general mass of property in the state, as contrasted with a transient status—viz., likelihood of being in one state today and in another tomorrow."

[fol. 218] When we review the decisions of the United States Supreme Court on this point we find that they require some definite fixedness of location in a state other than the owner's domicile before holding that the taxing jurisdiction of the domicile has been abrogated. In Frick v. Pennsylvania, paintings owned by the resident of Pennsylvania had been placed by him as a permanent exhibit in New York in a building constructed expressly for that purpose. With these facts before it the Court says:

"The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument for taxation at its situs, that of late there is a general concensus of opinion that it is taxable in the state where *it is permanently located* and *employed*, and where it receives its entire protection, irrespective of the domicile of the owner."

In City Bank Farmers Trust Co. v. Schnader, 293 U. S. 112, 79 L. Ed. 228, a resident of New York loaned his paintings indefinitely to a gallery in Philadelphia to be exhibited and sold. It was found he had no present intention of terminating the arrangement. The Supreme Court held the [fol. 219] paintings taxable at their situs in Philadelphia because, as the Court concludes:

"The location of the portraits in Pennsylvania was *not merely transient, transitory* or *temporary*, but it was fixed

in an *established abiding place* in which they remained for a long time." (Italics ours.)

The opinion of the lower Court in this same case in 8 Fed. Sup. 815, also contains a discussion of the meaning of "actual situs":

"Actual situs means a little more than simply the place where property is. It excludes the idea of mobile personal property which happens to be in the course of transit in or through the taxing state when the occasion for taxation arises. It also excludes the idea of property which for some definite purpose of its owner has come to rest within the boundaries of the taxing state for a brief or limited time. In either of these cases its location there would be of a brief or fleeting character . . . "

Almost all of the cases on situs refer as authority to Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 150. In this case the Court held that the plaintiff corporation could not be taxed at its domicile in Kentucky upon a large number of railroad cars which were perma- [fol. 220] nently used and employed in its business in other states. The decision of the Court is placed squarely on the ground of the use and employment of the property outside of Kentucky. The Court says:

"We are of opinion that the cars in question, so far as they were *located and employed in other states* than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that Court for further proceedings not inconsistent with this opinion." (Italics ours.)

At many other places in the opinion, the Court uses the term "permanent" and "permanently located" as describing the kind of location which is necessary to remove the taxable situs of tangible property from the domicile. In most of the cases dealing with the situs of tangible personal property for taxation we find present the idea that such property must be mingled with the mass of property in the state or incorporated and used in a local business. An interesting note written in connection with the case of City Bank

Farmers Trust Co. v. Schnader, supra, is found in Univer-
[fol. 221] sity of Cincinnati Law Review, Vol. 9, page 202, in which the writer says:

"The decisions indicate that personal property of a tangible character, to become taxable; must have acquired a situs of a permanent nature within the jurisdiction of the authority seeking to levy the tax. The use of the term 'permanent' in this connection may not mean the continued and unchangeable location of the property at a given place, but certainly does intend to include the idea of location which is not of a temporary or fleeting character. Gromer v. Standard Dredging Co. 224 U. S. 362, 377; Old Dominion S. S. Co. v. Va. 198 U. S. 299. Permanency in the abiding place is emphasized as essential to taxable situs, that is, the property sought to be taxed must become 'commingled' with the property of the state, or 'incorporated in the local property.' Old Dominion S. S. Co. v. Va., supra, Del. L. & C. R. R. Co. v. Pa. 198 U. S. 341, Southern Pacific Co. v. Ky., supra. All these expressions indicate the idea of a permanent situs of the property."

In their reply brief Appellants cited the following cases as supporting a taxable situs of the paper money in Chicago and these cases are also cited in the Court's opinion. Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257. American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 538. General
[fol. 222] Oil Co. v. Crain, 209 U. S. 211, 52 L. Ed. 754. Bacon v. Illinois, 227 U. S. 504, 57 L. Ed. 615. Minnesota v. Blasius, 290 U. S. 1, 78 L. Ed. 131. We agree that the holding of the Court in each of these cases is entirely sound under the facts which were before the Court therein. But the facts in all of these cases are wholly unlike those in the case at bar.

In Brown v. Houston, certain coal belonging to a resident of Pennsylvania was lying on barges at New Orleans awaiting sale at that place by the owner's agent. The Court held that the state of Mississippi had jurisdiction to tax coal because the Court found that

"It was imposed after the coal *had arrived at its destination* and *was put up for sale. The coal* had come to its *place of rest*, for *final disposal* or use, and was a *commodity in the market of New Orleans.*

In American Steel & Wire Co. v. Speed, steel products belonging to a New Jersey corporation were shipped to an agent in Tennessee who, from time to time at the direction of the owner, selected and filled orders from this stock and shipped the same to various purchasers. This was held to [fol. 223] constitute doing business in Tennessee. In respect to situs of the goods, the Court says:

"Page 546 L. Ed. With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had *reached their destination* at Memphis, and were there *held in store* at the risk of the steel company, to be sold and delivered as contracts for that purpose were completely consummated."

The same is true in General Oil Co. v. Crain where oil was shipped from refineries outside the state to plaintiff's plant in Memphis from which the plaintiff's customers in other states were supplied. It was held that the oil had reached its destination.

Similar holdings based on the same reasoning were arrived at in Bacon v. Illinois and Minnesota v. Blasius. In all of these cases the goods had arrived in the state and were being there held for sale or some other use directly connected with a local business conducted by the owner in said state. In each of them the owner was "doing business" actively in the state to which the goods were shipped and [fol. 224] where the tax was imposed. Under these circumstances even the accounts receivable and other intangibles growing out of or used in such business could have been taxed in the state where the business was being conducted. Marshall-Wells Hardware Co. v. Multnomah County, 58 Or. 469.

Let us remember that in the case at bar we are only concerned with taxation of the paper money. The sole question before this Court is whether or not this money was so kept, used or employed by Hayes in the state of Illinois as to lose taxable situs at the domicile and to acquire a permanent abiding place and taxable situs in his hands in that state. The location, ownership and use of this paper money by Hayes in the stato of Illinois was the very antithesis of permanent. It is admitted that Hayes had no business of any kind in the state of Illinois; in fact he had no active business anywhere, nor was he looking forward to commencing any

new business in that state. On the contrary it is admitted that he was in contemplation of death and hence was preparing for the termination of all his affairs, including life itself. He purchased the notes for the sole purpose of giv-[fol. 225] ing them away. We know of no case which holds that the act of making a single and final gift of one's property constitutes a "business". To paraphrase the language of the Supreme Court in the Schnader case, the ownership of these notes by Dr. Hayes was just as "transient, transitory or temporary" as he could possibly make it.

Since Dr. Hayes did not keep or store the money in Illinois and it is clear that he never intended to do so, and since he did not use it in that state in or connected with any activity which could be called a business, and since his gift of the notes was a single, isolated transaction, there remains no ground on which a claim of taxable situs in the state of Illinois can be sustained. The result is that since no situs outside the state of Oregon has been established, this state, which is the domicile of the deceased, has jurisdiction to tax the transfer of the notes.

This Court has remarked in a very early case that "Revenue is the life of a state". It is, therefore, of the utmost importance that the taxing power of the state shall not be [fol. 226] limited on constitutional grounds beyond the point required by decisions of the United States Supreme Court. We respectfully urge that the applicable decisions of that Court do not in this case require a denial of the taxing jurisdiction of the state of Oregon..

Respectfully submitted, I. H. Van Winkle, Attorney-General, Dean H. Dickinson, Attorneys for Respondent.

[fol. 227] Portland, Oregon, February 17, 1939.

Due service of the within petition for rehearing with brief and receipt of copy thereof duly certified by counsel for respondent is hereby acknowledged.

(Sgd.) Charles E. McCulloch.

[Stamp:] Supreme Court, State of Oregon. Filed Mar. 7, 1939. Arthur S. Benson, Clerk

IN THE SUPREME COURT OF THE STATE OF OREGON

No. 3374—March 7, 1939

McGRAW and HAYES, as Executors, Appellants, v. PEARSON, State Treasurer, Respondent

Appeal from Circuit Court, Multnomah County

George Tazwell, Judge

On petition for rehearing, filed February 18, 1939.

Original opinion filed January 17, 1939 (86 P. (2d) 424).

Department 1.

Fletcher Rockwood and Charles E. McCulloch, of Portland (Carey, Hart, Spencer & McCulloch, of Portland, on brief), for appellants.

Dean H. Dickinson, of Portland, for respondent.

Rossman, J.

Petition denied.

ROSSMAN, J.:

The state has filed a petition for a rehearing, and accompanying brief, both of which manifest concern lest our previous decision permits residents of this state, who desire to escape taxation, to sell their securities outside of this state, establish trusts with the proceeds, and thereby achieve their purpose.

In our previous decision we went to great length to point out that Dr. Hayes' acquisition of federal reserve notes in Illinois and his deposit of them there were not sufficient in themselves to give the notes an Illinois situs. We pointed out that (1) Dr. Hayes had resided less than two years in this state when the challenged transaction took place; (2) he never conducted any business in this state; (3) his fortune was made before he came here; (4) only a minor part of his securities was ever in this state; (5) his only bank account was with an Illinois bank; (6) the major part of his securities was in the possession of an Illinois trust company which collected sums due him, deposited them to his credit, honored his checks, and made investments for him; (7) the federal reserve notes were purchased with money thus accumulated: a Chicago bank account, money borrowed from

a Chicago bank, and the proceeds from the sale in Illinois of bonds which had never been in this state; (8) he never planned to bring the notes into Oregon; (9) the notes were acquired for the purpose of enabling Dr. Hayes to effect a transaction with them in Illinois; and (10) the trustee that he chose was domiciled in Illinois and the trust res was kept in that state.

We shall now consider the sixth element again.

In New Orleans v. Stempel, 175 U. S. 309, 44 L. Ed. 174, 20 S. Ct. 110, the issue for determination was thus stated in the decision:

"Under the circumstances disclosed by the testimony, were the money and credits subject to taxation? It appears that these credits were evidenced by notes largely secured by mortgages on real estate in New Orleans; that these notes and mortgages were in the city of New Orleans, in possession of an agent of the plaintiff, who collected the interest and principal as it became due and deposited the same in a bank in New Orleans to the credit of the plaintiff. The question, therefore, is distinctly presented whether, because the owners were domiciled in the State of New York, the money so deposited in a bank within the limits of the State of Louisiana, and the notes secured by mortgages situated and held as above described, were free from taxation in the latter state."

In rejecting the contention of the New York owner that these securities were not taxable in Louisiana, the court quoted from many authorities, and we now quote from its decision:

"In Goldgart v. People, 106 Illinois, 25, 28, the court said: 'If the owner is absent, but the credits are in fact here, in the hands of an agent, for renewal or collection, with the view of reloaning the money by the agent as a permanent business, they have a situs here for the purpose of taxation, and there is jurisdiction over the thing.' * * * This proposition was reaffirmed in People ex rel. v. Smith, 88 N. Y. 576, in which the Court of Appeals of that State held that a resident of New York was not liable to taxation on moneys loaned in the States of Wisconsin and Minnesota on notes and mortgages, which notes and mortgages were held in those States for collection of principal and interest and reinvestment of the funds, it appearing that property

so situated within the limits of those States were there subject to taxation. See also * * * " The decision sustained the Louisiana tax.

In Hall v. Miller, 102 Tex. 280, 115 S. W. 1168, the plaintiff, domiciled in Missouri, owned notes of the value of $116,285, which were in the possession of his agents located in Texas. These notes arose out of sales by his agents of Texas property. Payments made to the agents upon the notes from time to time were deposited by them in a Texas bank, to the credit of the plaintiff, and the latter drew upon the account as his needs required. In holding that the notes were taxable in Texas, the court declared that they had acquired a business situs in that state, and depended largely upon New Orleans v. Stempel, supra. See to same effect Monongahela River Consolidated Coal & Coke Co. v. Board of Assessors, 115 La. 564, 39 So. 601, 2 L. R. A. (N. S.) 637, 112 Am. St. Rep. 275.

In Era Plantation Co. v. Wilder, 289 Fed. 664, the plaintiff, a Hawaii corporation, was represented in San Francisco by an agent. The latter sold sugar produced by the plaintiff and deposited the sums received in a San Francisco bank to the credit of the plaintiff. Against these deposits the plaintiff drew from time to time. The San Francisco agent also possessed securities owned by the plaintiff, but had no authority to make investments. The decision stated:

"The plaintiff in error contends that the bonds, notes and deposits here in question have become localized and have acquired a business situs in San Francisco, and they cite cases in which foreign held bonds have been taxed at the place of their situs irrespective of the owner's domicile. The general doctrine of these cases is expressed in De Ganay v. Lederer, 250 U. S. 376, 39 Sup. Ct. 524, 63 L. Ed. 1042. In that case stocks and bonds issued by Pennsylvania corporations, and mortgages on real estate in Pennsylvania, were owned by an alien nonresident but were in the hands of an agent, a Pennsylvania corporation, authorized to sell, assign, and transfer them and to invest and reinvest the proceeds as it might deem best under a power of attorney to represent the owner and in the owner's behalf to vote and act at all meetings of corporations connected with such stocks and bonds. It was held that the income derived from the stocks and bonds was subject to taxation under the Income Tax Law of 1913. The court said: 'We have no doubt

that the securities herein involved are property. Are they property within the United States? It is insisted that the maxim mobilia sequuntur personam applies in this instance, and that the situs of the property was at the domicile of the owner in France. But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which required it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority.'

"In that case the significant facts were that the stocks and bonds were in the hands of a local agent empowered to sell and dispose of them or any of them according to his own judgment, to reinvest at his discretion, to hold the same for the owner's account, and to represent the owner and manage generally the owner's business affairs . . . ."

Having so quoted, the decision pointed out that the San Francisco agent had no authority to make investments or reinvestments, and held that the money was taxable in Hawaii. In other words, mere authority to collect and deposit in a bank did not give a local business situs.

In Crane Co. v. Des Moines, 208 Iowa 164, 225 N. W. 344, 76 A. L. R. 801, the court held that $35,000 of bank accounts possessed by the plaintiff's agency in Des Moines were taxable in Iowa. The plaintiff was an Illinois corporation with its principal place of business in Chicago. Its Des Moines agency sold the plaintiff's products, collected the book accounts, deposited the sums collected in a Des Moines bank, and periodically remitted the proceeds to the home office. The company challenged an Iowa tax levied upon the bank accounts. In holding that they were subject to Iowa taxation, the court declared that the company had given them a business situs independent of its domicile. It cited with approval Marshall Wells Hardware Co. v. Multnomah County, 58 Or. 469, 115 P. 150, wherein this court sustained a tax upon accounts receivable in the sum of $225,000 held by the Portland branch of the Marshall Wells Hardware Company, a New Jersey corporation, the principal office of which was located in Minnesota. That company maintained a branch in Portland and also a bank account varying in amount from $3,000 to $5,000. In sustaining the tax, this court, after reviewing many supporting decisions, said:

"In the case before us the choses in action were a part of the Oregon business, arising from sales made here, and the only evidence concerning them was in the hands of the Portland manager and were collectible by him; and whether the debtor is in or out of the state these debts are a part of the capital of the Oregon business, and were properly taxable in Multnomah County."

In the present instance, the stipulation of the parties states:

"As such agent said Harris Bank had collected income and principal on said bonds and dividends on stocks, had credited income so collected to a checking account of decedent in Harris Bank, subject to decedent's order, had acted as decedent's financial agent in his investments in bonds, stocks, and reinvestments in bonds and stocks of moneys received from maturities of principal of bonds and of moneys derived by Harris Bank from sales of bonds and stocks held by Harris Bank in said agency account for decedent. The bonds and stock certificates from time to time owned by decedent and held for decedent's account by Harris Bank were never physically present or situated within the State of Oregon, but were at all times while owned by decedent physically present and situated in Chicago."

Thus, the facts before us are similar to those which induced other courts, including the federal supreme court, to hold that securities were taxable at the place where they were constantly used; that is, where they had gained a business situs. Had the situation been reversed and the securities been maintained in this state by an elderly individual domiciled in Illinois, who, upon retirement from active pursuits, had conferred upon a local agent the authority possessed by the Harris Bank, we feel certain that Oregon would have believed that the securities had gained a local situs, that the fiction mobilia sequuntur personam was inapplicable, and that the securities were subject to Oregon taxation. It would have pointed out that the securities and the various transactions which were taking place constantly concerning them had the benefit and protection of the laws of this state—the quid pro quo for which tax money is taken. In view of the above, a belief that Dr.

Hayes intended to give an Illinois situs to the federal reserve notes, and never intended to bring them into Oregon, is greatly fortified.

Let us now consider further the tenth element stated in the second paragraph of this decision.

In Safe Deposit & T. Co. v. Virginia, 280 U. S. 83, 74 L. Ed. 180, 50 S. Ct. 59, 67 A. L. R. 386, the court held that securities in the possession of a trustee domiciled in Maryland were not taxable in Virginia, that being the domicile of the two beneficiaries of the trust, who were, respectively, five and eight years of age when the trust was established. The latter was to continue until the beneficiaries reached the age of twenty-five. In speaking of the doctrine of mobilia sequuntur personam which Virginia invoked, the court declared.

"Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact; the securities did not and could not follow any person domiciled in Virginia. Their actual situs is in Maryland and cannot be changed by the cestui que trust."

The situation in the present instance is substantially similar to that pictured in the language just quoted. The record does not disclose the residence of the beneficiaries of Dr. Hayes' trust.

The annotator in 67 A. L. R., at page 393, states:

"As a general principle, unless modified by statute, an executor, administrator or trustee is regarded as the owner, for purposes of property taxation, of the personal property which he holds by virtue of his office, and is taxable in the state in which he is domiciled. Nor, in the absence of statute, is such situs affected by the fact that the beneficiaries are not residents; or by the fact that the decedent was domiciled in, and the executor, administrator or trustee, as the case may be, receives his authority from the court of another state. * * *"

Thus, the notes were acquired with the proceeds from assets which were never in Oregon, but which, under the foregoing decisions, had acquired a business situs in Illinois.

The notes were never brought into this state and their owner's only intention was to keep them in Illinois during his ownership. The notes were obtained for the purpose of enabling Dr. Hayes to consummate a transaction in Illinois with an Illinois bank; and, finally, upon the consummation of the transaction, the notes, upon becoming the trust res, definitely had an Illinois situs.

In our previous decision we pointed out that tangible personal property is taxable in the place where it is permanently located; that is, more or less permanently. We also pointed out that in determining whether the property has acquired a location of a more or less permanent character the type of property must be taken into consideration; for instance, perishables have a permanency of very short duration; money may last for centuries and yet change hands daily. The permanency for purposes of taxation is determined, not by the life of the article but by the duration of each individual's ownership. In the present instance Dr. Hayes owned the federal reserve notes for a span of only a few days, but during that time the notes were in Illinois and, as already indicated, Dr. Hayes intended that they should remain there. He there engaged in a business transaction with them which constituted the only use to which he ever put them.

Without further analysis, we remain satisfied that the taxation situs of these notes was not in Oregon. To make the matter entirely clear, we state that we have considered all of the foregoing facts, and have not based our conclusion upon only one or two of them, as the State seems to believe. We do not mean to say, however, that each and every one of them was entirely essential.

The petition for a rehearing is denied.

Rand, C. J., and Kelly and Bailey, JJ., concur.

Be it Remembered, That at a regular term of the Supreme Court of the State of Oregon, begun and held at the Supreme Court room in the City of Salem, on Monday, the 6th day of March, 1939, the same being the First Monday in said month, at the time fixed by law for holding a regular term of said court, there were present:

John L. Rand, Chief Justice; George Rossman, Associate Justice; Percy R. Kelly, Associate Justice; Harry H. Belt,

Associate Justice; Henry J. Bean, Associate Justice; J. O. Bailey, Associate Justice; Hall S. Lusk, Associate Justice; Arthur S. Benson, Clerk.

Whereupon, on this Tuesday the 7th day of March, 1939, the same being the 2nd judicial day of said term of court, among other proceedings the following was had, to wit:

Dept. 1

In the Matter of the Estate of EDWARD STEPHEN HAYES, Deceased

RUTH HAYES McGRAW et al., Appellants,

vs.

WALTER E. PEARSON, as State Treasurer, Respondent

Appeal from Multnomah County

Now at this time the court being fully advised in the premises, it is ordered that the petition for a rehearing heretofore submitted, be and the same is hereby denied.

STATE OF OREGON,
County of Marion, ss:

I, Arthur S. Benson, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of record on appeal from the Circuit Court of Multnomah County, Oregon to the Oregon Supreme Court, together with opinions and orders of said Supreme Court in the case of Ruth Hayes McGraw and Edmund Hayes, Executors of the estate of Edward Stephen Hayes, deceased, and as individuals, are respondents, and W. E. Pearson, State Treasurer of Oregon, is petitioner, has been by me compared with the originals and that they are true and correct transcripts therefrom and from the whole of such originals as the same appear of record and on file in my office and in my care and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 27th day of April A. D. 1939.

Arthur S. Benson, Clerk, Supreme Court of Oregon.
(Seal Supreme Court, State of Oregon.)

[fol. 238] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of Oregon is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

[Endorsed:] File No. 43,475. Oregon, Supreme Court. Term No. 69. Walter E. Pearson, State Treasurer of the State of Oregon, Petitioner, vs. Ruth Hayes McGraw and Edmund Hayes, as Executors of the Last Will and Testament of Edward Stephen Hayes, Deceased, and as Individuals. Petition for a writ of certiorari and exhibit thereto. Filed May 26, 1939. Term No. 69 O. T. 1939.

(4143)

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 990 69

WALTER E. PEARSON, STATE TREASURER OF THE STATE OF OREGON,

Petitioner,

vs.

RUTH HAYES McGRAW AND EDMUND HAYES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWARD STEPHEN HAYES, DECEASED, AND AS INDIVIDUALS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON AND BRIEF IN SUPPORT THEREOF.

I. H. VAN WINKLE,
Attorney-General of Oregon,
DEAN H. DICKINSON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 990

IN THE MATTER OF THE ESTATE OF EDWARD STEPHEN HAYES, DECEASED.

WALTER E. PEARSON, STATE TREASURER OF THE STATE OF OREGON,

Petitioner,

vs.

RUTH HAYES McGRAW AND EDMUND HAYES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWARD STEPHEN HAYES, DECEASED, AND AS INDIVIDUALS,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

Walter E. Pearson, State Treasurer of the State of Oregon, respectfully petitions the Court to issue a writ of certiorari to the Supreme Court of the State of Oregon requiring that there be certified to the Supreme Court for determination by it that certain cause in which petitioner was respondent and respondents herein, Ruth Hayes McGraw and Edmund Hayes, as executors of the estate of Edward Stephen Hayes, deceased, and as individuals, were appellants.

A.

Summary Statement of Matter Involved.

Edward Stephen Hayes, a retired physician, died in Multnomah County, Oregon, February 11, 1936, at the age of seventy-nine years. He was a resident of and domiciled in the State of Oregon at the time of his death (R. 112). Until about six months before his death he possessed stocks, bonds and other intangibles worth in excess of $1,000,000.00, most of which were, and for some time had been, in the custody of Harris Trust & Savings Bank of Chicago, Illinois (hereinafter called Harris Bank) (R. 114). The Harris Bank acted as financial agent and advisor of Hayes in the safekeeping and investment of his personal fortune (R. 113).

In the fall of 1935, decedent's age and health were such that he distributed most of his estate by creating two trusts, with the Harris Bank as trustee, known as Edward Stephen Hayes Trust No. I and Edward Stephen Hayes Trust No. II (R. 118, 120). At his death he left property to the value of $28,228.91, which was disposed of by his last will executed September 25, 1935 (R. 17).

Respondents as executors of decedent's estate have admitted and paid inheritance tax to the State of Oregon on the probated estate and on that portion of the decedent's assets which were distributed by means of Trust No. II (R. 20, 122).

The State of Oregon, by its State Treasurer, seasonably demanded that inheritance tax be determined and paid upon the portion of decedent's assets which he had distributed by creating Trust No. I with the Harris Bank as trustee (R. 62). The tax is asserted under Section 10-601 Oregon Code 1930 (as amended by Chapter 26, Laws of Oregon, 1933), a copy of which is hereto attached (Appendix A). So far as material in this case, the statute reads:

"All property within the jurisdiction of the state, and any interest therein, * * * whether tangible or intangible, which shall pass or vest by * * * will or by statutes of inheritance * * *, or by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death of the grantor, or bargainor, * * * in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectation, to any property or income thereof, shall be and is subject to tax at the rate hereinafter specified in section 10-603, to be paid to the Treasurer of the state for the use of the state; * * *."

It is stipulated that at the date of his death and at the time the gift in question was made, Edward Stephen Hayes was domiciled in the State of Oregon (R. 112); and that the deceased made the gift as a distribution of his estate in contemplation of death (R. 119). No question of interpretation of Oregon statutes is involved; and it is conceded by respondents that if the property which was the subject of this transfer was within the jurisdiction of the State, the statute just cited is broad enough to subject the transfer to inheritance tax.

The transfer in question was a gift of $450,000.00 in paper money made by the deceased at Chicago, Illinois. Decedent obtained the currency by liquidating his bonds and he placed it in Chicago for the sole purpose of making the gift.

The facts of the case have been stipulated by the parties (R. 111, 136, 137), and as regards the distribution of decedent's estate by means of Trust No. I are as follows:

On August 8, 1935, Hayes directed Harris Bank to liquidate sufficient of his bonds to realize a fund of $450,000.00, and with that money to purchase Federal reserve notes of equal face value. The Bank proceeded to do so and by August 12, 1935, had realized from sale of bonds $176,-

062.01, to which the bank added $90,000.00 from Hayes checking account and $183,937.99 which is advanced to him on his promissory note (R. 115). This note was liquidated before the end of August by further sale of decedent's bonds. Between August 12th and August 15th, Harris Bank obtained for Hayes, with the money thus realized, forty-five Federal reserve notes of $10,000.00 denomination which it placed in the safe deposit box in his name at Harris Bank in the State of Illinois (R. 116).

On August 15, 1935, at Portland, Oregon, Hayes executed Trust No. I, by which he irrevocably transferred the Federal reserve notes to the Harris Bank, as trustee, for the sole use of his children and other beneficiaries (R. 118). Hayes forwarded the trust instrument to Chicago by air-mail and Harris Bank executed it in that city on August 17, 1935, and took possession of the money. Thereafter, commencing August 19, 1935, the trustee, from time to time, reconverted the money into securities and other personal property (R. 119). The record discloses no motive for the conversion of the intangibles into paper money before making the gift, other than the obvious one of attempting to evade the inheritance tax which the State of his domicile would impose on a gift of the bonds themselves.

Respondents assert that this gift is not subject to inheritance tax of the State of Oregon in his estate because the subject matter of the gift was tangible personal property situated in another state. In their first pleading and throughout the case, respondents defend on the ground that the imposition of inheritance tax on said gift by the State of Oregon deprives respondents of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Sections 18, 21 and 32 of Article I of the Constitution of the State of Oregon.

On the other hand petitioner contends that the paper money had no situs for taxation in Illinois because it was placed there for a single isolated transaction unconnected with any use or business in that State, because the gift was staged outside the State of Oregon solely to defeat inheritance tax at decedent's domicile. The State of the domicile has jurisdiction to tax all tangible personalty of its residents which is not shown to have obtained a separate and permanent situs elsewhere.

The Supreme Court of the State of Oregon held that the gift was beyond the taxing jurisdiction of this State.

B.

Reasons for Allowance of Writ.

I.

The decision of the Supreme Court of Oregon conflicts with decisions of this Court as to the taxable situs of tangible personal property, because it holds that the physical presence of the paper money in Illinois at the moment of gift was in itself sufficient to determine its situs for taxation and to deprive the State of the owner's domicile of jurisdiction to tax. The decision ignores the general right of the State of domicile to tax all of the personal property of its citizens, wherever found, which is not shown to have obtained a separate situs through use, storage or employment in some other place. In these particulars the holding of the Supreme Court of Oregon is contrary to principles announced in the following decisions:

Southern Pacific Co. v. *Kentucky*, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96;

Cream of Wheat Co. v. *County of Grand Forks*, 253 U. S. 325, 40 S. Ct. 558, 64 L. Ed. 931, 934;

Frick v. *Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058;

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150;

City Bank Farmers Trust Co. v. *Schnader*, 293 U. S. 112, 55 S. Ct. 29, 79 L. Ed. 228;

Blodgett v. *Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749.

II.

The attempt of this decedent to arrange for succession to his estate in a place outside Oregon by converting his assets momentarily into currency and giving it away in Illinois is a fraud on the revenue in the State of his domicile.

Shotwell v. *Moore*, 129 U. S. 590, 32 L. Ed. 827;

Baldwin v. *Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056.

III.

The decision of the Supreme Court of Oregon in this case is not strengthened by its holding in the opinion on rehearing that the decedent's intangibles had a business situs in the State of Illinois; for the record affirmatively shows that this decedent was not conducting any business in the State of Illinois within the meaning of that term as defined by this Court.

New Orleans v. *Stemple*, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174;

Blodgett v. *Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749.

IV.

The decision of the Supreme Court of Oregon is of great interest and concern to the various States in the enforcement of their inheritance tax laws, because if not reversed it opens a ready avenue by which a decedent's estate can, at the last moment, be broken up into small parcels and so

placed in several States as to avoid all inheritance tax. The decisions of this Court uphold taxation of tangible personal property at the owner's domicile unless it has obtained a permanent and *bona fide* abiding place elsewhere.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Oregon, and that the cause may be reviewed and determined by this Court and that the judgment of the Supreme Court of the State of Oregon may be reversed by this Court.

WALTER E. PEARSON,
State Treasurer of
the State of Oregon,
By I. H. VAN WINKLE,
Attorney-General of Oregon,
DEAN H. DICKINSON,
Counsel for Petitioner.

APPENDIX A.

Inheritance Tax Laws.

Section 10–601, O. C. 1930. Property and transfers subject to tax—Exceptions.

All property within the jurisdiction of the state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass or vest by dower, curtesy, will or by statutes of inheritance of this, or any other state, or by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death of the grantor, or bargainor, or intended to take effect in possession or enjoyment after the death of the grantor, bargainor or donor to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectation, to any property or income thereof, shall be and is subject to tax at the rate hereinafter specified in section 10-603, to be paid to the treasurer of the state for the use of the state; and whenever property, real or personal, other than real property held by the entirety, is held in the joint names of two or more persons, or deposited in banks or other institutions or depositories in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving joint tenant or tenants, person or persons to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this act in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant or joint depositor and had been devised or bequeathed to the surviving joint tenant or tenants, person or persons, by such deceased joint tenant or joint depositor by will, excepting therefrom such parts thereof as may be shown to have originally belonged to such surviving joint tenant, joint depositor or person, and never to have been acquired from the decedent for less than a fair consideration in money or money's worth, and if said prop-

erty shall have been acquired from decedent for less than such fair consideration, there shall be excepted from the value of said property a portion equal to the amount of the consideration so furnished; and all heirs, legatees and devisees, administrators, executors and trustees, and any such grantee under a conveyance, and any such donee under a gift made during the grantor's or donor's life, shall be respectively liable for any and all such taxes, with interest thereon, until the same shall have been paid as hereinafter provided; provided, however, that devises, bequests, legacies and gifts to benevolent, charitable or educational institutions, societies, associations or corporations organized or existing within this state and actually engaged in this state in carrying out the objects and purposes for which so organized or existing, or to a corporation, association or society to be organized for such purposes under the laws of this state pursuant to the terms of the instrument providing such devise, bequest or gift; and devises, bequests, legacies or gifts to any corporation, society, institution, person or persons or association of persons in trust for such charitable, benevolent or educational purpose where such devise, bequest, legacy or gift is limited by the donor for use within the United States of America shall be exempt from taxation under the provisions of this act; and provided further, that there shall be exempted from taxation under this act all proceeds and contract of life insurance taken out at any time on the life of the decedent and payable to a beneficiary or beneficiaries other than the estate or the executor or administrator of the estate of the deceased insured, whether payable directly or to or through a trustee, immediately or at future dates; but such exemptions shall not include any investment policy issued by a life insurance company which does not include in the policy the element of life insurance. Any transfer of property made by a decedent by deed, grant, bargain, sale or gift, within three years prior to said decedent's death without a valuable and adequate consideration therefor, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this act.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Supreme Court of the State of Oregon is reported in Vol. 28, Oregon Advance Sheets 103 and 403, 86 Pac. (2d) 424 and 87 Pac. (2d) 766 (R. 141).

Jurisdiction.

The judgment of the Supreme Court of Oregon was entered on the 17th day of January, 1939 (R. 166). A petition for rehearing was filed February 18, 1939, within the time provided therefor as extended by order of the Supreme Court entered February 8, 1939 (R. 168). Petition for rehearing was considered by the court and thereafter denied on March 7, 1939 (R. 211).

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Acts of December 23, 1914, c. 2, 38 Stat. 790; September 6, 1916, c. 248, Section 2, 39 Stat. 726; February 17, 1922, c. 54, 42 Stat. 366; February 13, 1925, c. 229, Section 1, 43 Stat. 937; Jan. 31, 1928, c. 14, Section 1, 45 Stat. 54.

Respondents herein claimed and specially set up in their answer and amended answer that the gift of $450,000.00 in paper money made by Hayes to the Harris Bank was immune from inheritance tax of the State of Oregon in the estate of said decedent under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 18, 21 and 32 of Article I of the Constitution of the State of Oregon for the reason that said transfer was a gift of tangible personal property situated beyond the taxing jurisdiction of the State of Oregon. The Supreme Court of the State of Oregon upheld this contention and reversed the Circuit Court.

Statement of the Case.

This action arises out of objections seasonably filed by the Treasurer of the State of Oregon to an *ex parte* order of the Circuit Court of Multnomah County, Oregon, determining the amount of inheritance tax in the Hayes estate. In his objections the State Treasurer demands that inheritance tax be determined and paid to the State of Oregon upon paper money of the value of $450,000.00 which was given by the deceased to the Harris Trust & Savings Bank of Chicago, Illinois, under an irrevocable trust created by him August 15, 1935. Respondents, as executors of decedent's estate and as individual beneficiaries, answered contending that the gift consisted solely of currency physically located in Chicago, which was beyond the taxing jurisdiction of the State of Oregon. The State Treasurer replied and the matter being tried upon a written stipulation of the facts, resulted in a decree of the Circuit Court determining that the gift was subject to tax. The facts surrounding creation of the gift have been outlined in the foregoing petition.

On appeal the Supreme Court of Oregon held that the Federal reserve notes had no taxable situs in Oregon when given in trust by deceased and hence the gift was not subject to inheritance tax in Oregon. It is stipulated that decedent was domiciled in the State of Oregon, and was in contemplation of death at the time he made the gift. It is conceded by respondents that the inheritance tax law of the State of Oregon is broad enough to impose tax on this gift, provided the property which was the subject matter of the gift was within the taxing jurisdiction.

Specification of Error.

The Supreme Court of Oregon erred in holding that the State of Oregon does not have jurisdiction to tax the gift.

Summary of the Argument.

I.

Tangible personal property is taxable at the domicile of its owner where it is not shown to have acquired a separate abiding place in some other State.

II.

The State of domicile does not lose jurisdiction to tax tangible personal property of its citizens even though the property is outside the State until it is shown that the property has acquired a separate situs through use or employment in some other place.

III.

Jurisdiction of the State of domicile to tax tangible personal property is not defeated where the owner places the property temporarily outside the State to avoid taxation.

Argument.

Petitioner's position is that Oregon, as the State of decedent's domicile, has jurisdiction to impose inheritance tax upon the transfer in contemplation of death of all the decedent's personal property which is not shown to have had a definite abiding place elsewhere. This record affirmatively shows that decedent's ownership of the paper money was temporary and its physical presence in Chicago at the date of the gift was merely transitory as far as decedent was concerned.

All property must have a situs somewhere, and under the maxim *mobilia sequuntur personam*, personal property,

either tangible or intangible, is generally deemed to have its situs and to be subject to tax at the domicile of the owner.

Endicott, Johnson & Co. v. *Multnomah County,* 96 Or. 679;

Callendar Navigation Co. v. *Pomeroy,* 61 Or. 343, 352;

Southern Pacific Co. v. *Kentucky,* 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96.

It is conceded that an exception to this rule has been established to the effect that a State cannot tax tangible personal property of its citizens where such property has, by continued use or location, obtained a situs of its own, outside the State of the domicile.

Blodgett v. *Silberman,* 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749;

Frick v. *Pennsylvania,* 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058;

Union Refrigerator-Transit Co. v. *Kentucky,* 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150.

But the exception last noted only applies to cases where the facts show a definite location of the tangibles in a place apart from the domicile of the owner, and thus overcome the presumption of situs at the domicile. The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent situs beyond its boundaries.

Cream of Wheat Co. v. *County of Grand Forks,* 253 U. S. 325, 328, 40 S. Ct. 558, 64 L. Ed. 931, 934.

The degree of permanence with which tangibles must be kept in a place other than the owner's domicile in order to attain a separate situs, has been variously described by this Court as "Permanent location elsewhere", *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63, 32 S. Ct. 13, 56 L.

Ed. 96; "actual situs", *Frick* v. *Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058; "located and employed in other states", "permanently located", *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 56 L. Ed. 150; "not merely transient, transitory or temporary, but * * * fixed in an established abiding place", *City Bank Farmers Trust Co.* v. *Schnader*, 293 U. S. 112, 55 S. Ct. 29, 79 L. Ed. 228. In the light of their respective facts the above decisions clearly indicate that to come within this exception, the tangibles in question must have arisen out of, or been used in connection with some local business; or must have been kept, stored or exhibited with some substantial degree of permanence in the other State. It has never been held by this Court that mere physical location is sufficient without proof of some of the additional factors last mentioned to establish a taxable situs for tangible personal property apart from the owner's domicile.

Southern Pacific Co. v. *Kentucky, supra*;
Cream of Wheat Co. v. *County of Grand Forks, supra.*

The case at bar is not within the exception to the rule that movables are taxable at the domicile because the record is devoid of any evidence of permanence in the location of the paper money in Illinois as far as this decedent was concerned. On the contrary the record affirmatively shows that the money was owned by decedent for only three or four days; that it did not arise out of any business conducted in Illinois; nor was it obtained, used or kept in connection with any business. It is stipulated that the money was obtained for one specific and isolated transaction, that is, as the vehicle for making an immediate and final gift. One transaction does not constitute a business, nor can giving away one's estate be properly termed a "business." Paper money is an inherently movable article which only fulfills its function by passing from hand to hand and from

place to place in the course of business. This characteristic of mobility is even more pronounced in money than in sea-going vessels, which the Court has said to have no permanent situs anywhere.

Cream of Wheat Co. v. *County of Grand Forks, supra; Southern Pacific Co.* v. *Kentucky, supra.*

In the latter case, vessels were held taxable at the domicile of the owner in Kentucky although they had never been in that State and, being ocean-going vessels, could never be brought to Kentucky. The service which these ships rendered for their owner in its shipping business was all performed outside the State of domicile. In the case at bar ownership and use of the money by decedent was not connected with any business in Illinois but on the contrary was as transient and transitory as it could be made.

In the absence of any evidence of permanence in use or ownership of this currency in Illinois the Supreme Court of Oregon sought support for its holding by tracing the currency back into bonds which were liquidated to obtain the money. It was suggested in the original opinion, and held in the opinion on rehearing, that the bonds themselves out of which the currency was obtained had been left by decedent in the custody of an Illinois agent for a number of years and thus obtained a "business situs" in that State, which carried over into the currency. In support of this holding the Oregon court relied largely upon *New Orleans* v. *Stemple*, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174. But this case does not support the holding because in *New Orleans* v. *Stemple* the intangibles held taxable in Louisiana were used in carrying on a business in that State. In *Blodgett* v. *Silberman, supra*, a resident of Connecticut who conducted all of his business in New York City, left bonds and other intangibles in his New York safe deposit box. None of the bonds had ever been in the State of

Connecticut but were habitually kept in the State of New York. This Court held the bonds taxable at decedent's domicile in Connecticut and the opinion states that *New Orleans* v. *Stemple* had little or no bearing for the reason above stated.

The record in this case shows that the decedent was retired. He conducted no business in any place except the investment of his own fortune. The mere management by an agent in Chicago of Dr. Hayes' private investments under his direction and subject to his control does not constitute "doing business" in that State; *Manufacturers Trust Co.* v. *Hackett*, 118 Conn. 101, 170 Atl. 792. The situation is not comparable to that in *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 50 S. Ct. 59, 74 L. Ed. 180, where securities were irrevocably committed to the custody of a trustee. In the case at bar Dr. Hayes was in full control and could have ordered the securities forwarded to his domicile at any moment.

The fact that decedent selected a bank outside the State of Oregon as trustee of the gift is immaterial, for the gift itself was the taxable event and we are not concerned with the location of the trust after the gift was made.

If Dr. Hayes had died possessed of the bonds there is no doubt that the State of Oregon would have had jurisdiction to impose inheritance tax thereon in his estate.

Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371;

Baldwin v. *Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056.

The State of Oregon likewise had jurisdiction to tax an irrevocable gift of these bonds in contemplation of death. The only motive which the decedent could have had in converting the bonds into paper money was to place himself in possession of something tangible long enough to com-

plete a gift of this capital in Illinois, and thus, if possible, create a taxable situs outside the State of his domicile. It was admitted on the argument in the court below that such was his purpose. In *Baldwin* v. *Missouri, supra,* this Court reserved for future consideration a case where a decedent should "undertake to arrange for succession" in some State other than his domicile and "thus defeat the collection of the death duties prescribed at his domicile". In the case at bar a studied, but last moment, effort was made to arrange for succession outside the State of Oregon in the capital which he intended to place in Trust No. I. This gift has been given the form but it does not have the substance of a bona fide transaction. It is a fraud on the revenue of the State of Oregon which should not be tolerated.

Shotwell v. *Moore,* 129 U. S. 590, 32 L. Ed. 827;
Poppleton v. *Yamhill County,* 8 Or. 338.

Respectfully submitted,

I. H. VAN WINKLE,
Attorney-General,
DEAN H. DICKINSON,
Counsel for Petitioner.

(1913)

Office - Supreme Court, U. S.
FILED
OCT 31 1939
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 69

WALTER E. PEARSON, STATE TREASURER OF THE STATE OF OREGON,

Petitioner,

v.

RUTH HAYES McGRAW AND EDMUND HAYES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWARD STEPHEN HAYES, DECEASED, AND AS INDIVIDUALS,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

I. H. VAN WINKLE,
Attorney-General of Oregon,
WILLIS S. MOORE,
Assistant Attorney-General,
DEAN H. DICKINSON,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 69

IN THE MATTER OF THE ESTATE OF EDWARD STEPHEN HAYES, DECEASED.

WALTER E. PEARSON, STATE TREASURER OF THE STATE OF OREGON,

Petitioner,

v.

RUTH HAYES McGRAW AND EDMUND HAYES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWARD STEPHEN HAYES, DECEASED, AND AS INDIVIDUALS,

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PETITIONER'S SUPPLEMENTAL BRIEF

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The judgment of the Supreme Court of Oregon was entered on the 17th day of January, 1939 (R. 166). A petition for rehearing was filed February 18, 1939,

within the time provided therefor as extended by order of the Supreme Court entered February 8, 1939 (R. 168). Petition for rehearing was considered by the court and thereafter denied on March 7, 1939 (R. 211).

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Acts of December 23, 1914, c. 2, 38 Stat. 790; September 6, 1916, c. 248, Section 2, 39 Stat. 726; February 17, 1922, c. 54, 42 Stat. 366; February 13, 1925, c. 229, Section 1, 43 Stat. 937; Jan. 31, 1928, c. 14, Section 1, 45 Stat. 54.

Respondents contend and in their pleadings have averred that the State of Oregon is without jurisdiction to impose the inheritance tax herein demanded upon a gift made by decedent in contemplation of death, for the alleged reason that the subject matter of the gift was tangible personal property situated outside the State of Oregon; and that the imposition of such tax would constitute a taking of Respondents' property without due process of law, contrary to Section I of the Fourteenth Amendment to the Constitution of the United States. A judgment in favor of the State for the amount of tax demanded was reversed on appeal by the Supreme Court of the State of Oregon on the constitutional grounds asserted by Respondents.

STATEMENT OF THE CASE

This action arose out of objections filed by the Treasurer of the State of Oregon to an ex parte order of the Circuit Court of Multnomah County, Oregon, determining inheritance tax in the estate of Edward Stephen Hayes, deceased. The State Treasurer demanded that inheritance tax be paid to the State of Oregon upon a gift by the deceased to Harris Trust & Savings Bank

of Chicago, Illinois, as trustee for decedent's children, their spouses and issue. Respondents, as executors of decedent's estate and as individual beneficiaries, filed answer alleging that the gift consisted of currency physically located in Chicago, and beyond the taxing jurisdiction of the State of Oregon. The State Treasurer replied and the case being tried upon written stipulation of facts, resulted in a decree that the State was entitled to inheritance tax on the gift.

On appeal the Supreme Court of the State of Oregon reversed the decree, holding that the gift could not be subjected to inheritance tax by the State of Oregon without violation of Article I of the Fourteenth Amendment to the Federal Constitution.

SUMMARY OF FACTS

The facts of this case have been agreed by the parties by admissions in the pleadings and by written stipulation which, for convenience, is attached to this brief as Appendix A. For the purpose of the argument they may be summarized as follows:

Edward Stephen Hayes, a retired physician, died in Multnomah County, Oregon, February 11, 1936, at the age of seventy-nine years. He was a resident of and domiciled in the State of Oregon at the time of his death (R. 112). Until about six months before his death he possessed stocks, bonds and other intangibles worth in excess of $1,000,000.00, most of which were, and for some time had been, in the custody of Harris Trust & Savings Bank of Chicago, Illinois (hereinafter called Harris Bank) (R. 114). The Harris Bank acted as financial agent and advisor of Hayes in the safekeeping and investment of his personal fortune (R. 113).

In the fall of 1935, decedent's age and health were such that he distributed most of his estate by creating two trusts, with the Harris Bank as trustee, known as Edward Stephen Hayes Trust No. I and Edward Stephen Hayes Trust No. II (R. 118, 120). At his death he left property to the value of $28,228.91, which was disposed of by his last will executed September 25, 1935 (R. 17).

Respondents as executors of decedent's estate have admitted and paid inheritance tax to the State of Oregon on the probated estate and on that portion of the decedent's assets distributed by means of Trust No. II (R. 20, 122).

The State of Oregon seasonably demanded inheritance tax upon the portion of decedent's assets which he had distributed by creating Trust No. I (R. 62). The tax is asserted under Section 10-601, Oregon Code 1930 (as amended by Chapter 26, Laws of Oregon, 1933), a copy of which is hereto attached (Appendix B). So far as material in this case, the statute reads:

> "All property within the jurisdiction of the state, and any interest therein, * * * whether tangible or intangible, which shall pass or vest by * * * will or by statutes of inheritance * * *, or by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death of the grantor, or bargainor, * * * in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectation, to any property or income thereof, shall be and is subject to tax at the rate hereinafter specified in section 10-603, to be paid to the Treasurer of the state for the use of the state; * * *"

It is stipulated that at the date of his death and at the time the gift in question was made, Edward Stephen Hayes was domiciled in the State of Oregon (R. 112); and that he made the gift as a distribution of his estate in contemplation of death (R. 119). No question of interpretation of Oregon statutes is involved; and it is conceded by respondents that if the property which was the subject of this transfer was within the jurisdiction of the State, the statute just cited is broad enough to subject the transfer to inheritance tax.

In creating Trust No. I decedent gave $450,000.00 to the Harris Bank at Chicago, Illinois, for the use of his children and other beneficiaries. Prior to the creation of this trust, decedent's estate was invested in stocks, bonds and other intangibles. A day or two prior to completion of the gift, decedent converted $450,000 of his bonds into Federal reserve notes which were then handed over to the trustee. The precise manner in which this conversion was accomplished is as follows:

On August 8, 1935, Hayes directed Harris Bank to liquidate sufficient of his bonds to realize a fund of $450,000.00, and with that money to purchase Federal reserve notes of equal face value. The Bank proceeded to do so and by August 12, 1935, had realized from sale of bonds $176,062.01, to which the bank added $90,000.00 from Hayes checking account and $183,937.99 which it advanced to him on his promissory note (R. 115). This note was liquidated before the end of August by further sale of decedent's bonds. Between August 12th and August 15th, Harris Bank obtained for Hayes, with the money thus realized, forty-five Federal reserve notes of $10,000.00 denomination

which it placed in a safe deposit box in his name at Harris Bank in the State of Illinois (R. 116).

On August 15, 1935, at Portland, Oregon, Hayes executed Trust No. I, by which he irrevocably transferred the Federal reserve notes to the Harris Bank, as trustee, for the sole use of his children and other beneficiaries (R. 118). Hayes forwarded the trust instrument to Chicago by airmail and Harris Bank executed it in that city on August 17, 1935, and took possession of the money. Thereafter, commencing August 19, 1935, the trustee, from time to time, reconverted the money into securities and other personal property (R. 119).

ARGUMENT

It is obvious from reading the inheritance tax law of the State of Oregon (Section 10-601, Oregon Code 1930), that the Legislature intended to reach and tax every transfer of property within the jurisdiction of the State, which was made as a distribution of the decedent's estate in contemplation of death. There is no dispute in this case on any of the elements of tax except one. It has been stipulated (1) that decedent was domiciled in the state of Oregon; (2) that he made a gift of $450,000 as a distribution of his estate; and (3) that the gift was made in contemplation of his death. The dispute arises over whether the subject matter of the gift was within the taxing jurisdiction of the state.

It is Respondent's contention, sustained by the Court below, that the gift in question is not within the taxing jurisdiction of the state of Oregon by reason of the fact that the actual property handed over

to the trustee consisted of Federal reserve notes. They contend that these notes were chattels which at the time had a physical situs in Illinois and hence were not taxable in the State of Oregon.

On the other hand, Petitioner's position is that the State of Oregon has jurisdiction to tax this gift because Oregon was the domicile of decedent at the time of his death; and because at the time decedent planned and commenced to carry out his gift the property in question consisted of intangibles having their taxable situs within the state. Petitioner contends that the temporary conversion of these intangibles into Federal reserve notes before the gift was completed did not defeat the taxing power of this state, because the conversion itself was done in contemplation of death as a device to evade tax.

A

The Oregon inheritance tax is a tax on the right or privilege of the living to receive property from the dead.

In re Inman's Estate, 101 Or. 182, 199 Pac. 615.

In re Lewis' Estate, 160 Or. 486, 85 Pac. (2d) 1032.

B

The tax extends to the transfer in contemplation of death by a resident of Oregon of his intangibles located in another state.

Curry v. McCanless, 307 U. S. 357, 83 L. ed. 865.
Graves v. Elliott, 307 U. S. 383, 83 L. Ed. 880.
Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410, 72 L. ed. 749.
Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436, 74 L. ed. 1056.

Respondents take too narrow a view of the question presented by this case. The taxable event is not, as they argue, the mere manual transmission of the Federal reserve notes from Dr. Hayes to the Harris Bank. That act constituted only part of the transaction. The taxable transfer is the "advancement or division of his . . . estate" made by Dr. Hayes in contemplation of his death. This transfer was not accomplished in an instant for completion of the gift required the performance of a number of related acts extending over a period of nine or ten days.

Dr. Hayes commenced making the gift on August 8, 1935, by directing his financial agent to liquidate securities, and did not complete it until the trustee took possession of the Federal reserve notes on August 17, 1935. Between these two dates, the Harris Bank was selling the decedent's bonds and getting possession of the Federal reserve notes. Meanwhile decedent was engaged in executing the trust indenture and forward-

ing the same for acceptance by the trustee. All of these acts taken together constitute the distribution referred to by the statute; and each and all of them were done in contemplation of the donor's death.

At the time this train of events was set in motion the estate which decedent had determined to divide among his heirs was invested in stocks, bonds and other intangibles which had a situs for taxation at Dr. Hayes' domicile in the State of Oregon. *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371; *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056; *Blodgett v. Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749.

The Harris Bank, at Chicago, had custody of these intangibles as financial agent and advisor of decedent; but that custody was not such as to give them a business situs in the state of Illinois. *New Orleans v. Stemple*, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174; *Manufacturers Trust Co. v. Hackett*, 118 Conn. 101, 170 Atl. 792.

C

The State of Oregon has jurisdiction to tax the transfer by a resident of his intangibles which have acquired a business situs in some other state.

Curry v. McCanless, 307 U. S. 357, 83 L. Ed. 865.
Graves v. Elliott, 307 U. S. 383, 83 L. Ed. 880.

Even if it be assumed that the intangibles had acquired a business situs in Chicago the State of Oregon was not, thereby, deprived of its power to tax them. *Curry v. McCanless*, 307 U. S. 357, 183 L. Ed. 865; *Graves et al. v. Elliott*, 307 U. S. 383, 83 L. Ed. 880.

In *Curry v. McCanless*, 307 U. S. 357, 183 L. Ed. 865, this court held that notwithstanding intangibles had acquired a situs for taxing purposes in another state, they continued to be taxable at the domicile of the owner, for the reason that:

> "* * * The decedent's power to dispose of the intangibles was a potential source of wealth which was property in her hands from which she was under the highest obligation, in common with her fellow citizens of Tennessee, to contribute to the support of the government whose protection she enjoyed. Exercise of that power, which was in her complete and exclusive control in Tennessee, was made a taxable event by the statutes of the state. * * *"

It is the contention of the petitioner in this case that this duty of the settlor did not terminate upon the conversion of the intangibles into tangibles under the circumstances involved, but continued until the gift was completed. The duty of the settlor to the State of Oregon did not terminate *ipso facto* upon the conversion being completed. The intangibles were held by his agent in Illinois for a very brief period, and no further business transactions with them were required or contemplated until the gift had been completed. Under such circumstances it should not be held that the tangibles acquired a situs for taxation in Illinois, or that they ceased to be subject to taxation by any state during the time they were retained by the agent

in that form. The State of Oregon has no interest in the tangibles or what was done with them after the gift was completed, except to show the intent of the settlor that they should soon thereafter be reconverted into income-bearing property.

D

Such jurisdiction is not defeated by a change in the nature of the gift or of its location when made for the purpose of evading the tax.

Cooley on Taxation, 4th Ed., Sec. 548.
Shotwell v. Moore, 129 U. S. 590, 32 L. Ed. 827.
Whiting Finance Co. v. Hopkins, 115 Cal. App. 756, 2 Pac. (2d) 461.
Brock & Co. v. Los Angeles County, 8 Cal. (2d) 286, 65 Pac. (2d) 791.
Poppleton v. Yamhill County, 8 Or. 388.
Durham v. Anderson, 6 Ind. App. 23.
West Virginia Mortgage & Discount Corp. v. Newcomer, 101 W. Va. 292.
In re People's Bank of Vermont, 208 Ill. 300.

It is perfectly clear that when Hayes decided to make the gift and commenced to execute his intention, the property which he intended to give away was within the jurisdiction of the State of Oregon, and this jurisdiction was not divested by the simple device of converting the subject matter into Federal reserve notes long enough to complete the gift. The possibility that such schemes might be tried was foreseen in

Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, where this Court reserved for future consideration any case in which the decedent should "undertake to arrange for succession" in some state other than his domicile and "thus defeat collection of the death duties prescribed at his domicile".

The only motive which Hayes could have had in converting his bonds into paper money was to place himself in possession of something tangible long enough to complete a gift in the state of Illinois, and thus, if possible, remove the taxable situs from the state of his domicile. This was admitted on the argument in the Court below and we presume it will not be denied here. If successful, decedent would thus remove $450,000 of his taxable estate from the higher brackets of the Oregon rates and thus cut down inheritance tax on his estate by a large amount. It cannot be denied that the conversion of the intangibles into paper money was merely temporary. The stipulation shows that it commenced on August 8th and was completed on the 15th, when the trust was signed. and that reinvestment in intangibles commenced on August 19th. One has only to read the provisions of Trust No. I to see that Dr. Hayes did not intend this capital to remain dormant in the shape of bank notes. The Trust is replete with directions for its profitable investment. His intention was to make his gift yield income to his beneficiaries, and this purpose would have been totally defeated if the subject matter of the gift remained buried in the shape of currency. So the purchase of the Federal Reserve Notes was not only *temporary in fact* but also it was *intended by Hayes* to be merely temporary.

Hayes knew that Oregon would tax all gifts except those of tangible property having an "actual situs" outside the State, so he sought to lend a tangible form to this gift by dressing it up temporarily in the form of currency. His selection of Federal Reserve Notes as a vehicle was no doubt dictated by obvious reasons of convenience and safety. He could not conveniently buy real estate or tangible commodities of such value in the time he had at his command; and such property cannot be reconverted into securities without serious delay, risk and trouble.

We concede, of course, that any citizen of the state of Oregon has the absolute right to remove his domicile from its jurisdiction. He may also invest his estate in real property or tangibles having a bona fide situs elsewhere, even though the change is made to escape the tax laws of this state. But in all such cases the good faith and permanence of the change are open to inquiry. In Cooley on Taxation, 4th Ed., Sec. 548, it is said:

> "On the other hand, taxation cannot be avoided (1) by a plan in itself unlawful or (2) by a plan lawful in itself, not actually carried out, which is a mere subterfuge to escape taxation. If the transaction is merely a temporary change of property from nonexempt into exempt property made shortly before the assessment, with the intent of restoring the property to its original form after the assessment, there is such fraud as warrants taxation of the property."

The rule was approved by this Court in *Shotwell vs. Moore*, 129 U. S. 590, 32 L. Ed. 827, where a taxpayer attempted to evade tax on his bank deposit by withdrawing all of it just before assessment date in the shape of nontaxable greenbacks which he redeposited

a few days later. The Court held this a fraud on the revenue which did not defeat the State's right to tax.

In that case the defendant, who for many years had been a resident of Ohio, transferred his general deposits into securities commonly called "greenbacks", enclosed the same in a package, wrote his name thereon, and returned the same to the officer of the bank, requesting him to place the same in the bank's safe for him, which was done. The court found that on no occasion did the defendant carry the money out of the bank building; and in the early part of the next week in each of said years he returned to the bank and demanded his package, which was given him, and he opened the same and delivered it to an officer of the bank, asking that the amount should be placed to his credit as a general depositor, which was done; that on each occasion the defendant drew out the balance due him with intent to evade taxation on such balances. This court said, page 596 of U. S. Report, page 828 of L. Ed.:

> "It does not need the finding of the court below as a fact to show that this was an evasion, and a discreditable one, of the taxing laws of the State, if it could be made successful. It is, therefore, urged that on this ground alone—the illegal purpose for which the transactions were made in the bank—the court should hold the plaintiff in error liable to taxation for the amount thus converted. * * *"

In referring to the case of *Mitchell v. Leavenworth County*, 91 U. S. 206, 23 L. Ed. 302, involving conduct which the court held to be precisely similar to that of the plaintiff in *Shotwell v. Moore*, the court said:

> "All these decisions show that the courts look upon this transaction as indefensible, and consider

it an improper evasion of the duty of the citizen to pay his share of the taxes necessary to support the Government which is justly due on his property."

Among other cases cited by the court in that opinion are *Poppleton v. Yamhill County*, 8 Ore. 337, and *Jones v. Seward Co.*, 10 Neb. 154.

In the last named case Jones, the owner of a bank, converted funds in the bank to his individual credit into United States bonds. The court said, page 159:

"Where a change is thus made for the sole purpose of defrauding the government of its just dues, and to enable a party to escape the payment of his just proportion of the taxes imposed by law, he cannot shelter himself behind such temporary change in the character of his funds to escape taxation."

In *Durham v. The State, ex rel. Anderson*, 6 Ind. App. 23, appellant had on the 11th day of January, 1888, on deposit to his credit in a bank $100,000.00 in money, and agreed to maintain that amount in deposit in consideration of the payment of interest at four per cent. On the 31st day of March, 1888, he had on deposit to his credit in the bank, under said contract, $104,842.00. For the fraudulent purpose of preventing a large portion of such property from being listed, and evading the payment of taxes thereon, he, on that day, drew his check on the bank against his said account for $24,025.00 and presented it to the cashier of the bank, and requested and received in payment therefor that sum in United States treasury notes not taxable, commonly called greenbacks. Upon receiving those notes appellant enclosed them in a package and placed same for safe keeping in the safe of said bank,

where he kept the same until the 11th day of April, 1888, when the cashier of said bank requested that they be restored to his credit in said bank under said contract, and thereupon the appellant withdrew said package and redeposited said sum of treasury notes in the bank, and they were placed to his credit in the books thereof. The court said, page 27:

> "The liability to taxation for such property is not determined by the apparent ownership on the 1st of April. It is to be taxed to the person who temporarily converted it for such purpose, if the assessor can discover that it has been so converted. It is immaterial, in such a case, whether the converted property has been transferred beyond the limits of the State or not. In either case, it is property which under the statute is liable to taxation. The evading the burden of taxation for which the penalty is prescribed is none the less a fraud upon the revenue because the transaction is between persons resident in this State, and does not result in the transfer of any property beyond the limits of the State."

In *West Virginia Mortgage & Discount Corporation v. Newcomer*, 101 W. Va. 292, the Mortgage & Discount Corporation a few days before the beginning of the tax year, for the purpose of evading taxation, executed to a nonresident brokerage firm its note, payable a few days after the beginning of the tax year, for a sum equal to the full amount of its money, credits and investments, to be used in purchasing for its use United States or other nontaxable securities, which were to be attached to the note as collateral security. The plaintiff never saw the bonds or certificates, and did not know in fact that the agent ever purchased same, except from letters received. The certificates were never

within the State of West Virginia. In considering the question of whether or not there was any really subsisting indebtedness on the return day for taxation, the court found that the tranaction began on December 15th, and a resale of the securities was made on January 10th in satisfaction and in extinguishment of the note. The court said, page 299:

"* * * We think it plain, however, that the creation of the debt and its discharge constituted but a single transaction, and that no debt in fact existed after the transaction formally creating it which was not in legal effect discharged at the same time by a contemporaneous appropriation of the securities pledged, if in fact any such securities were purchased for plaintiff's account.

* * * * * *

"It can not be controverted that a citizen acting in good faith, may of right invest his money in nontaxable government or other nontaxable securities, even though his object be to avoid payment of taxes; the law gives him that right. And we are cited to decisions from other states, sustaining the proposition that one who borrows money and invests it in nontaxable securities, is entitled, if the statute gives him the right, to deduct the indebtedness thus created from the amount of his money, credits and investments for the purpose of establishing a basis for taxation, the debt being real, bona fide, and not colorable and feigned or fraudulent in fact: Among the cases cited are: People ex rel. Thurman, Respondent, v. John Ryan, Jr., et al., Appellants, 88 N. Y. 142; Stillwell v. Corwin, 55 Ind. 433; Hutchinson v. Board of Equalization, 67 Iowa, 182; United States v. Isham, 84 U. S. 496.

"But as already indicated, the view we take of the facts in this case renders it unnecessary for us to go into or review the cases relied on by counsel for plaintiff. We prefer to rest our decision wholly

upon what we deem a proper construction of our statute and the fact that although there was a colorable transaction between plaintiff and C. F. Childs & Company, by which plaintiff attempted to create a fictitious debt which it might deduct from the amount of its money, credits and investments in its return to the assessor, it was colorable only, and in fact no bona fide debt within the meaning of our statute was owing by it on the first day of January, 1924, for which it was entitled to such reduction. The assessor and the board of equalization and review were therefore justified in denying the offset or deduction; and there is no error in the judgment of the circuit court complained of on the present writ."

In re People's Bank of Vermont, 208 Ill. 300, the president of the bank was called before the board of tax review and asked whether he bought government bonds late in March, 1901, and sold them early in April, 1901, for the express purpose of evading the tax on money, which question he declined to answer, but did state: "I did it to save taxes, because they were not subject to taxation, as I thought." The court said, page 305:

"* * * The president of the bank in effect admitted that the bonds were purchased for the purpose of evading taxation, and the circumstances tend most strongly to establish that such was the fact and purpose. This was a banking institution, and if it was the mere question of the safe keeping of these bonds and the transaction was an investment for the benefit of profits to the banking concern, there could be no good reason for leaving them upon special deposit in some bank distant from the situs of taxation. We may not be warranted, from the evidence, in saying that such was the fact, but it may be easily seen that the bonds in question, lying in the hands of the convenient depository,

may have subserved the same purpose for many like banking institutions, and thus repeatedly defrauded the State and municipalities of their proper taxes. While such institutions have the right to invest in such securities, and courts are bound to recognize that right, when it becomes a question between them and the State, and that question relates to the purpose of the purchase, and the facts tend to show that such purpose was the evasion of taxation, then the courts may look upon such transaction as none other than fraudulent in law, and of such character that the beneficiaries can not be allowed, under the cloak of an apparent legitimate transaction, to thus avoid their duty and responsibility to the State."

In *Poppleton vs. Yamhill County*, 8 Or. 338, a resident of Yamhill County sought to remove his notes and mortgages from the taxing jurisdiction of the county by placing them temporarily in the hands of a firm in another county as security for a loan to him of $1,000.00. The Court says:

"That the property in the notes was in Poppleton was not questioned, but it is claimed that by the evidence it appeared that they were pledged to De Lashmutt and Oatman to secure the one-thousand dollar note given by Poppleton to them. If they were so pledged, in good faith, to secure the payment of this note, then they were not taxable in Yamhill County, but were taxable in Multnomah under section 15, page 757, of the statute. But if, in order to avoid the payment of the taxes in Yamhill County, Poppleton borrowed one thousand dollars of De Lashmutt and Oatman, and assigned or delivered these notes to them for the purpose of avoiding such taxes, then the transaction was in bad faith and a fraud on the revenue of Yamhill County, and the question of the interest of the respondent in this transaction was a question

of fact, which the board was necessarily called on to try from the evidence."

"To have found this they must have found from the evidence that these notes were transferred by Poppleton to avoid the payment of taxes on them in said County, which would have been a fraud on the revenue of the County, and void as to the County, and could not affect the right of the County to have the property taxed",

In *Whiting Finance Co. vs. Hopkins*, 115 Cal. A. 756, 2 Pac 2d 461, the taxpayer attempted to create an offset against its taxable credits by borrowing $350,000.00 just before the assessment date. It invested this money temporarily in government bonds which were sold after the assessment to liquidate the loan. The Court quotes the following from an earlier California case:

"The weight of authority in our opinion as well as the dictates of decency, honor and loyalty, uphold the right of boards of equalization to fully inquire into transactions of this character with a view to preventing evasion of taxation by individuals or corporations seeking by these and similar methods to do so".

In *Brock & Company v. Los Angeles County*, 8 Cal. 2d 286, 65 Pac. 2d 791, the Court sustained a tax in Los Angeles County at the domicile of the plaintiff, on a stock of jewelry which the taxpayer removed from the jurisdiction to Hawaii shortly before the date of assessment, and later returned to its place of business in California.

The principle on which such schemes are held ineffective by the Courts is, not that the shift of property from place to place, or from one form to another was not *actually made* by the taxpayer; but rather that

the change made was *temporary* in fact and intention. This principle applies with equal force in the case at bar. It is absurd to say from the facts before us that Hayes had any intention of making a permanent investment in Federal Reserve Notes. He shifted his intangibles into that form and held the notes in Chicago only long enough to sign the gift in trust.

This decedent was a resident of the state of Oregon and as such enjoyed its full protection of his person and estate. His estate ought to contribute to the support of the state its full proportion of tax. The power of taxation inherent in this state ought not to be defeated by last minute attempts at evasion.

This Court will readily appreciate the serious loss of revenue to the states which will result, if it be held that they are without constitutional power to tax gifts in contemplation of death made under the circumstances here disclosed. Any individual who felt death approaching and who possessed liquid securities would be able, at the last moment, to convert the same into parcels of currency in one or more states and thus avoid most of the inheritance tax at his domicile. The possibilities are by no means exhausted in the case at bar, for by placing the currency in a large number of states, the decedent could probably bring all of his estate within the several exemptions and thus avoid all inheritance tax. We do not perceive how the situation could be remedied by legislation.

E

The Federal reserve notes involved in this case did not acquire a situs for taxation purposes in the State of Illinois because they were acquired only for the

specific purpose of evading taxation, and were not used for any permanent purpose in that state.

Southern Pacific Co. v. Kentucky, 222 U. S. 63, 32 S. Ct. 13, 56 L. ed. 96.

Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410, 72 L. ed. 749.

Frick v. Pennsylvania, 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150.

City Bank Farmers Trust Co. v. Schnader, 293 U. S. 112, 55 S. Ct. 29, 79 L. ed. 228.

There is a further principle of law which supports the jurisdiction of the State of Oregon to tax this transfer. Under the maxim "mobilia sequuntur personam" it was the rule that all personal property, both tangible and intangible, had its situs at the domicile of the owner. The rule is thus expressed in *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96:

> "Since, therefore, an artificial situs for purposes of taxation is not acquired by the enrollment nor by the marking of a name upon the stern, the taxable situs must be that of the domicile of the owner, *since that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere.* The ancient maxim which assigns to tangibles as well as intangibles, the situs of the owner for purposes of taxation, has its foundation in the protection which the owner receives from the government of his residence; and the exception to the principle is

based upon the theory that if the owner, by his own act, gives to such property a *permanent location elsewhere*, the situs of the domicile must yield to the actual situs and resulting dominion of another government." (Italics ours.)

Disputes as to the taxable situs of tangible personalty ordinarily arise where the owner for business reasons keeps or uses the property in some state other than his domicile. But examination of the facts in the case at bar shows that it does not present any such situation. Dr. Hayes had no business other than keeping his money invested; and at the time he purchased the notes and made the gift in question he was not contemplating a business venture, but on the contrary was arranging a distribution of his property in contemplation of death.

We do not know where the Federal reserve notes involved in this case were located prior to their acquisition by Dr. Hayes and that fact is immaterial. Neither are we concerned with the location of the notes after they were taken into the possession of the trustee. It is stipulated, however, that as far as Dr. Hayes was concerned the notes were only owned and kept by him for a few days. This record affirmatively shows that the ownership of the notes by Dr. Hayes was the antithesis of permanent. He did not own, use or store the property in Chicago for any appreciable time nor intend to do so. He acquired these notes at the latest possible moment and for the sole purpose of giving them away immediately.

Respondents are forced to contend that mere physical presence of the notes in Chicago at the instant of gift is in itself sufficient to establish a taxable situs there, but we have not found any decision which sup-

ports this view. In the Court below, Respondents relied on *Blodgett v. Silberman*, supra, where a trifling sum of coin and currency belonging to a resident of Connecticut, but which was found at his death in a safe deposit box in New York, was held to have its taxable situs in the state of New York. The report in that case does not disclose the circumstances under which the money was kept by the decedent in New York, but the opinion does state that it was "so definitely fixed and separated in its actual situs from the person of the owner" as not to be "distinguished from the paintings and furniture held in the Frick case to be taxable only in the jurisdiction where they were".

We turn, therefore, to the Frick case (268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058), to discover what factors must have been present to cause the Court to make the comparison between the two cases.

We find that Frick was a resident of Pennsylvania, who at his death owned tangible personalty which ". . . consisted of rare paintings, rugs, furniture, bronzes, porcelains and other art treasures known as 'The Frick Collection', and housed in a building in New York City specially constructed for that purpose".

These art treasures were not casually or temporarily in New York at decedent's death. On the contrary, the fixed nature of that location is apparent from the fact that they were housed in a building specially constructed for that purpose. Since the Court in the Blodgett case draws a parallel between the situation of the money in New York and the location of the Frick art treasures in the same city, the Court must have found that Hirsch's money was in New York with some degree of permanence. And this would seem

natural since his business was in New York and only his residence in Connecticut.

The Frick case makes clear what is necessary to establish an "actual situs" for taxation outside the domicile. The art treasures were "permanently located and employed" in New York City, and received their protection in that jurisdiction. Likewise, they were bulky so as to be easily found and taxed. It is such a use and such a location that constitutes "actual situs". How can this designation be applied to the situation of the property in the case at bar? In the Frick case the paintings had been owned and exhibited in New York for years, and the owner's intention to leave them there is evidenced by the fact that a building was constructed to house the collection; in our case, the very ownership of the property was transient. Decedent actually held the notes for three days only, and his intention was to give them away as soon as possible.

On the point of situs of tangibles, both the Blodgett and Frick cases mention the earlier decision *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150, where it was held that rolling stock "permanently located" and used in states other than the domicile of the owner in Kentucky could not be taxed by Kentucky. What is meant in *Union Refrigerator Transit Co. v. Kentucky*, supra, by the term "permanently located" is made clear in the later case of *Southern Pacific Co. v. Kentucky*, supra, where it is said:

> "It has been urged that the case of Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, 50 L. Ed. 150, lays down the principle that jurisdiction to impose taxes upon tangible property is, under the 14th Amendment, wholly dependent upon

the actual situs of the property taxed, and that the fiction which gives movables the situs of the owner for purposes of taxation is inconsistent with that due process of law guaranteed under that Amendment. The question for decision in that case, as stated in the fore part of the opinion, was, 'whether a corporation organized under the law of Kentucky is subject to taxation upon its property *permanently located in other states, and* employed there in the prosecution of its business'. The property in question was railroad cars, a kind of movables obviously capable of acquiring a permanent location other than that of the owner. The judgment of the court was that the taxation of such property so *permanently located* elsewhere by the law of the domicile of the owner would be a denial of due process of law, and beyond the power of the state. The principle was not a new one, and was declared to rest upon repeated judgments of this court, the cases of Northern C. R. Co. v. Jackson, 7 Wall. 262, (and other cases), being cited as precedents. That judgment did not deny to the state of the domicile of the owner power to tax tangibles which had not acquired an actual situs elsewhere." (Emphasis is that of the Court.)

In *City Bank Farmer's Trust Co. v. Schnader*, 293 U. S. 112, 55 S. Ct. 29, 79 L. Ed. 228, a decedent who was domiciled in New York owned certain paintings which he had placed in Philadelphia for exhibit and sale under a loan agreement of indefinite duration. The Court found that the evidence disclosed more or less permanent location of the paintings in Philadelphia on account of their continued exhibition there, with no immediate intention on the part of the owner to remove them. The opinion concludes:

"The location of the portraits in Pennsylvania was *not merely transient, transitory* or *temporary*,

but it was fixed in an *established abiding place* in which they remained for a long time." (Italics ours.)

It cannot be plausibly asserted that Hayes had given these Federal Reserve Notes any "established abiding place" in the safety deposit box. Their presence in the box was just as "transient, transitory or temporary" as Hayes could make it, for they were only intended to remain in the box until he could sign up the trust.

The term "permanent", as used by the Courts in discussing the law of situs, does not, of course, require a showing that Hayes intended to keep the Federal Reserve Notes in Illinois perpetually. It is true, as Respondents argued in the Court below, that the decisions only require a showing of "more or less permanent location". But in our case the record does not disclose the slightest degree of permanence in connection with the presence of these notes in Illinois, so far as Hayes is concerned. On the contrary, it affirmatively appears that Hayes only obtained the notes with the intention of giving them away immediately, and their presence in the deposit box was simply one step in the transit of the gift from Hayes to his donees. It is as though Hayes had purchased the notes and placed them in a mail box to be picked up and delivered to the trustee.

The modification of the rule mobilia sequuntur personam, by which tangibles which have acquired an actual situs apart from the owner's domicile are held to be immune from tax at the domicile, is obviously designed to prevent injustice. But the cases above mentioned clearly indicate the limits of the modification,

so that it cannot be carried to the opposite extreme and be used as an instrument of tax evasion. See also *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325, 40 S. Ct. 558, 64 L. Ed. 931, 934.

The Supreme Court of the State of Oregon in its opinion stressed the fact that the decedent had only been domiciled in the State of Oregon for a few years prior to his death. We are unable to perceive how this is at all material since the power of the state to tax its citizens cannot be measured by the duration of their domicile. When Dr. Hayes took up his residence in the State of Oregon, he became subject to all of its laws and taxes, and ceased to be subject to the laws and taxes of his former domicile in Wisconsin. He never resided in the state of Illinois. In its opinions on this case the Oregon Supreme Court relies on the following as supporting a taxable situs of the paper money in Chicago and these cases are also cited in the Court's opinion. *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257. *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538. *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. Ed. 754. *Bacon v. Illinois*, 227 U. S. 504, 57 L. Ed. 615. *Minnesota v. Blasius*, 290 U. S. 1, 78 L. Ed. 131. We agree that the holding of the Court in each of these cases is entirely sound under the facts which were before the Court therein. But the facts in all of these cases are wholly unlike those in the case at bar.

In *Brown v. Houston*, certain coal belonging to a resident of Pennsylvania was lying on barges at New Orleans awaiting sale at that place by the owner's agent. The Court held that the state of Mississippi had jurisdiction to tax coal because the Court found that

> "It was imposed after the coal *had arrived at its destination* and *was put up for sale. The coal* had

come to its *place of rest*, for *final disposal* or use, and was a *commodity in the market of New Orleans.*"

In *American Steel & Wire Co. v. Speed*, steel products belonging to a New Jersey corporation were shipped to an agent in Tennessee who, from time to time at the direction of the owner, selected and filled orders from this stock and shipped the same to various purchasers. This was held to constitute doing business in Tennessee. In respect to situs of the goods, the Court says [Page 546 L. Ed.]:

> "With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but on the contrary, had *reached their destination* at Memphis, and were there *held in store* at the risk of the steel company, to be sold and delivered as contracts for that purpose were completely consummated."

The same is true in *General Oil Co. v. Crain* where oil was shipped from refineries outside the state to plaintiff's plant in Memphis from which the plaintiff's customers in other states were supplied. It was held that the oil had reached its destination.

Similar holdings based on the same reasoning were arrived at in *Bacon v. Illinois* and *Minnesota v. Blasius*. In all of these cases the goods had arrived in the state and were being there held for sale or some other use directly connected with a local business conducted by the owner in said state. In each of them the owner was "doing business" actively in the state to which the goods were shipped and where the tax was imposed. Under these circumstances even the accounts receivable and other intangibles growing out of or used in such business could have been taxed in the state where the busi-

ness was being conducted. *Marshall-Wells Hardware Co. v. Multnomah County*, 58 Or. 469.

None of these cases involved the temporary conversion of intangibles into tangibles for the purpose of evading taxes. All of them arose out of ordinary business transactions to which the question of tax was purely incidental.

The constitutional provisions relied upon by Respondents in this case were designed as a shield against oppression; but they are not being invoked for that purpose here. The facts of this case, when examined in the light of reasonable human behavior clearly show that decedent has attempted to so manipulate the subject matter of this gift as to use those consitutional guaranties as a cloak for evasion of inheritance tax at his domicile. The case should be reversed.

Respectfully submitted,

I. H. VAN WINKLE,
Attorney-General for the State of Oregon,

WILLIS S. MOORE,
Assistant Attorney-General,

DEAN H. DICKINSON,
Counsel for Petitioner.

APPENDIX A

STIPULATION OF FACTS

reading with caption and title omitted, as follows:

Come now Ruth Hayes McGraw and Edmund Hayes, executors of the estate of Edward Stephen Hayes, deceased, by and through their attorneys of record, and Rufus C. Holman, State Treasurer of the State of Oregon, by and through his attorney of record, and stipulates that the following is a true statement of facts relating to a transfer by said decedent of certain property by virtue of a trust agreement hereinafter referred to, dated August 15, 1935:

I.

Decedent died testate February 11, 1936, and was at the time of his death a resident of and domiciled in the County of Multnomah, State of Oregon. Decedent was a physician by profession but had retired from active practice and had attained the age of 79 years at the time of his death.

II.

Thereafter, the last will and testament of decedent was admitted to probate by this court, and in accordance with said will, Ruth Hayes McGraw, decedent's daughter, and Edmund Hayes, decedent's son, were appointed as executors and thereafter qualified and are now acting as executors of said will and the estate of decedent. The said last will and testament on file in this court, is by this reference made a part of this stipulation of facts.

III.

Decedent, prior to the time of establishment by him of a domicile in the State of Oregon, was and for over fifty years had been a resident of and domiciled in the City of Eau Claire, in the State of Wisconsin. During the month of September, 1933, decedent moved to Oregon, and established a domicile in Multnomah County, Oregon. For a period of over ten years prior to August 15, 1935, Harris Trust and Savings Bank, an Illinois corporation, (hereinafter referred to as "Harris Bank") had acted as agent of decedent as custodian of bonds and some stocks owned by decedent. Stocks so held by said Harris Bank included only so-called "market stocks", that is, stocks listed and actively traded on the principal security exchanges. As such agent said Harris Bank had collected income and principal on said bonds and dividends on stocks, had credited income so collected to a checking account of decedent in said Harris Bank, subject to decedent's order, had acted as decedent's financial agent in his investments in bonds, stocks, and reinvestments in bonds and stocks of moneys received from maturities of principal of bonds and of moneys derived by Harris Bank from sales of bonds and stocks held by Harris Bank in said agency account for decedent. The bonds and stock certificates from time to time owned by decedent and held for decedent's account by Harris Bank were never physically present or situated within the State of Oregon, but were at all times while owned by decedent physically present and situated in Chicago, in the State of Illinois. In addition to securities thus administered by said Harris Bank as agent, decedent owned other personal property consisting for the most part of unlisted stocks, and certificates

for said other stocks were held by decedent at Portland, Oregon, until the time of the establishment of the trust under agreement dated September 19, 1935, hereinafter referred to.

IV.

On or about August 8, 1935, Harris Bank held in said agency account at Chicago, Illinois, bonds owned by decedent of the par value of $691,000.00, and said bonds had a market value of not less than $625,000.00. On said date decedent owned other personal property, consisting for the most part of corporate stocks and balances on deposit in banks, of a value of approximately $400,000.00. On or about August 8, 1935, decedent directed Harris Bank to sell and liquidate sufficient of said bonds, owned by decedent and held by Harris Bank, to procure a sum which together with cash balances in decedent's account with Harris Bank would equal $450,000.00, and directed Harris Bank to use the sum of $450,000.00 thus obtained to purchase, as decedent's agent, Federal Reserve Notes of the face value of $450,000.00. Said Harris Bank complied with said directions and between August 8, 1935, and August 12, 1935, as agent for decedent, sold in the open market bonds held by Harris Bank and owned by decedent, and from that source realized for decedent's account the sum of $176,062.01. On August 12, 1935, decedent borrowed from Harris Bank, on a demand promissory note, the sum of $183,937.99. On said date decedent had a balance in his checking account in excess of $90,000.00, in addition to any sums herein referred to. Thereupon and prior to August 15, 1935, Harris Bank, with the cash balances in decedent's account with said Harris Bank, derived to the extent of

$176,062.01 from said sale of bonds, to the extent of $183,937.99 from said loan by Harris Bank, and to the extent of $90,000.00 from credit balances in decedent's account from other sources, purchased for decedent forty-five (45) Federal Reserve Notes of the denomination of $10,000.00 each, and numbered from G00000031 A to G00000040A, both inclusive, and from G00000126A to G00000160A, both inclusive, of the value of $450,000.00, and decedent thereupon became the owner of said Federal Reserve Notes. All of said Federal Reserve Notes were thereupon and prior to August 15, 1935, placed in a safe deposit box rented by decedent, being box No. 2100, in the vault of Harris Safe Deposit Company, in the City of Chicago, Illinois, and remained in said box from the time they were placed therein until August 19, 1935. On August 19, 1935, certain of said Federal Reserve Notes were removed from said safety deposit box, but the remainder thereof remained in said safety deposit box, and were removed therefrom at times subsequent to August 19, 1935. At no time prior to August 19, 1935, were any of said Federal Reserve Notes within the State of Oregon, and the parties to this stipulation have no evidence that any of said Federal Reserve Notes have ever been within the State of Oregon.

V.

Between August 12, 1935, and August 29, 1935, said Harris Bank, upon directions by the decedent, and as decedent's agent sold in the open market bonds held by said Harris Bank in said agency account, and as proceeds of said sales were received by it, paid said proceeds to itself on account of said demand note, and on August 29, 1935, said demand note was thus paid in full by decedent. Payments thus made on account

of the principal due on said demand note were made in amounts and on dates as follows:

Date, 1935	Paid	Balance Due
Aug. 12		$183,937.99
13	$120,191.07	63,746.92
14	41,635.83	22,111.09
15	1,175.00	20,936.09
16	1,246.52	19,689.57
17	5,300.52	14,389.05
19	11,377.62	3,011.43
21	1,037.99	1,973.44
21	245.56	1,727.88
29	1,727.88	.00

VI.

On August 15, 1935, decedent, then being in Multnomah County, Oregon, executed in counterparts that certain agreement dated August 15, 1935, between decedent, as Settlor, and said Harris Bank, as Trustee, to create a trust to be known and designated as "Edward Stephen Hayes Trust, Number One, dated August 15, 1935." Said counterparts of said agreement dated August 15, 1935, thus executed by decedent, were forwarded *by United States air mail* to said Harris Bank, at Chicago, Illinois. On or before August 17, 1935, said counterparts were received at Chicago, Illinois, by said Harris Bank, and on or before August 17, 1935, said counterparts were executed by said Harris Bank by its officers thereunto duly authorized. Exhibit A, attached to and made a part of "Objections of State Treasurer to Determination of Inheritance Tax," is a true copy of said agreement dated August 15, 1935.

VII.

The transfer by decedent of said Federal Reserve Notes to said Harris Bank by said agreement of August 15, 1935, was made by decedent in contemplation of his death.

VIII.

From time to time after August 19, 1935, said Federal Reserve Notes were removed from said safety deposit box No. 2100, and were thereafter used by said Harris Bank to purchase bonds and other personal property for the account of said Edward Stephen Hayes Trust Number One, and property thus purchased by the use of said Federal Reserve Notes has at all times after August 19, 1935, been held and administered by said Harris Bank, as trustee of said Edward Stephen Hayes Trust Number One. None of the property thus acquired by said trustee for said Edward Stephen Hayes Trust Number One was ever owned by decedent, and in particular, said trustee did not purchase or otherwise acquire for said Edward Stephen Hayes Trust Number One any of the bonds or other assets which at any time were owned by decedent or which at any time constituted a part of the property held by said Harris Bank as agent for decedent.

IX.

On or about September 19, 1935, decedent, then present in Multnomah County, Oregon, executed in counterparts that certain agreement dated September 19, 1935, between decedent, as Settlor, and said Harris Bank, as Trustee, to create a trust to be known as "Edward Stephen Hayes Trust, Number Two, dated September 19, 1935." Said counterparts of said agreement of September 19, 1935, thus executed by decedent, were forwarded to said Harris Bank, at Chicago, Illinois;

and or before September 24, 1935, said counterparts were executed by said Harris Bank by its officers thereunto duly authorized. A true and correct copy of said agreement dated September 19, 1935, is attached to and made a part of the executors' "Petition for Order Determining Inheritance Tax," heretofore filed in this court, as Exhibit A to said petition. Said Exhibit A to said petition is by this reference made a part of this stipulation of facts. The making of an agreement, as finally set forth in said agreement dated September 19, 1935, was under consideration by decedent at the time of the preparation and execution of said agreement dated August 15, 1935, but decedent did not definitely conclude to make said agreement dated September 19, 1935, until some time subsequent to September 1, 1935.

X.

The order made and entered herein, dated February 19, 1937, determining inheritance tax, to which the objections of State Treasurer to determination of inheritance tax were directed, determined as the gross estate of decedent subject to Oregon inheritance tax, property, the legal title to which was vested in decedent at the date of his death, and the property held by said Harris Bank, as trustee, on February 11, 1936, the date of decedent's death, and constituting the entire assets of said Edward Stephen Hayes Trust Number Two, established by said agreement dated September 19, 1935; but said gross estate subject to tax, so determined, did not include the property of the value of $450,000.00 transferred by decedent by said agreement of August 15, 1935, or any assets of said Edward Stephen Hayes Trust Number One acquired by said Harris Bank, as trustee, by the use of property so transferred by said agreement of August 15, 1935. If

all of the property transferred by said agreement dated August 15, 1935, were included in decedent's gross estate subject to Oregon inheritance tax, then the gross estate of decedent subject to such inheritance tax by the State of Oregon would be as follows:

Gross estate subject to inheritance tax as shown in said order dated February 19, 1937	$ 637,196.52
Additional amount, transfer by said agreement dated August 15, 1935	450,000.00
Total	$1,087,196.52

XI.

Donald Hayes McGraw, one of the beneficiaries named in said agreements dated, respectively, August 15, 1935, and September 19, 1935, was, on and prior to August 15, 1935, and at all times subsequent thereto, has been the legally adopted son of Ruth Hayes McGraw, the decedent's daughter, and of Don McGraw, her husband.

This stipulation is entered into for the sole purpose of determining the facts herein set forth, and may be offered in evidence by either of the parties hereto as proof of the facts herein recited, subject to the right of either party to object to the receipt in evidence of the entire stipulation or of any fact herein recited upon the ground of lack of materiality. But nothing herein set forth shall be construed by any court as an admission by said executors that the subject of said transfer by decedent by said agreement dated August 15, 1935, or any assets acquired by said Harris Bank, as trustee, by the use of property so transferred by said agreement dated August 15, 1935, is subject to inheritance

tax by the State of Oregon, or may be included in any way in the determination of the gross estate of said decedent subject to inheritance tax by the State of Oregon.

It is further stipulated and agreed that all of the documents on file in this court in the matter of the estate of Edward Stephen Hayes, deceased, may be considered as a part of the record in these proceedings to the same extent as though each of said documents were offered and received in evidence by this court in the proceedings relating to the objections of the State Treasurer to the order of February 19, 1937, determining inheritance tax.

DEAN H. DICKINSON,

Of Attorneys for Rufus C. Holman, State Treasurer of Oregon.

CHARLES E. MCCULLOCH,

FLETCHER ROCKWOOD,

CAREY, HART, SPENCER & MCCULLOCH,

Attorneys for Ruth Hayes McGraw and Edmund Hayes, Executors of the Estate of Edward Stephen Hayes, Deceased.

APPENDIX B

INHERITANCE TAX LAWS

Section 10-601, O. C. 1930. Property and transfers subject to tax—Exceptions.

All property within the jurisdiction of the state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass or vest by dower, curtesy, will or by statutes of inheritance of this, or any other state, or by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death of the grantor, or bargainor, or intended to take effect in possession or enjoyment after the death of the grantor, bargainor or donor to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectation, to any property or income thereof, shall be and is subject to tax at the rate hereinafter specified in section 10-603, to be paid to the treasurer of the state for the use of the state; and whenever property, real or personal, other than real property held by the entirety, is held in the joint names of two or more persons, or deposited in banks or other institutions or depositories in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving joint tenant or tenants, person or persons to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this act in the same manner as though the whole property to which such transfer relates be-

onged absolutely to the deceased joint tenant or joint depositor and had been devised or bequeathed to the surviving joint tenant or tenants, person or persons, by such deceased joint tenant or joint depositor by will, excepting therefrom such parts thereof as may be shown to have originally belonged to such surviving joint tenant, joint depositor or person, and never to have been acquired from the decedent for less than a fair consideration in money or money's worth, and if said property shall have been acquired from decedent for less than such fair consideration, there shall be excepted from the value of said property a portion equal to the amount of the consideration so furnished; and all heirs, legatees and devisees, administrators, executors and trustees, and any such grantee under a conveyance, and any such donee under a gift made during the grantor's or donor's life, shall be respectively liable for any and all such taxes, with interest thereon, until the same shall have been paid as hereinafter provided; provided, however, that devises, bequests, legacies and gifts to benevolent, charitable or educational institutions, societies, associations or corporations organized or existing within this state and actually engaged in this state in carrying out the objects and purposes for which so organized or existing, or to a corporation, association or society to be organized for such purposes under the laws of this state pursuant to the terms of the instrument providing such devise, bequest or gift; and devises, bequests, legacies or gifts to any corporation, society, institution, person or persons or association of persons in trust for such charitable, benevolent or educational purpose where such devise, bequest, legacy or gift is limited by the donor for use within the United States of

America shall be exempt from taxation under the provisions of this act; and provided further, that there shall be exempted from taxation under this act all proceeds and contract of life insurance taken out at any time on the life of the decedent and payable to a beneficiary or beneficiaries other than the estate or the executor or administrator of the estate of the deceased insured, whether payable directly or to or through a trustee, immediately or at future dates; but such exemptions shall not include any investment policy issued by a life insurance company which does not include in the policy the element of life insurance. Any transfer of property made by a decedent by deed, grant, bargain, sale or gift, within three years prior to said decedent's death without a valuable and adequate consideration therefor, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this act.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 69

WALTER E. PEARSON, State Treasurer of the State of Oregon
Petitioner
v.
RUTH HAYES McGRAW and EDMUND HAYES, as executors of the last will and testament of Edward Stephen Hayes, deceased, and as individuals
Respondents

RESPONDENTS' BRIEF

CHARLES E. McCULLOCH,
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Of Counsel for Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 69

WALTER E. PEARSON, State Treasurer of the State of Oregon
Petitioner
v.
RUTH HAYES McGRAW and EDMUND HAYES, as executors of the last will and testament of Edward Stephen Hayes, deceased, and as individuals
Respondents

RESPONDENTS' BRIEF

REFERENCE TO OPINIONS BELOW

This case is before the court upon a writ of certiorari to review a decision of the Supreme Court of the State of Oregon. The opinions of that court have not been officially reported. The original decision rendered January 19, 1939, is contained in 28 Oregon Advance Sheets 103 (86 P. (2d) 424). The opinion rendered

on March 7, 1939, denying petitioner's petition for rehearing, is contained in 28 Oregon Advance Sheets 403 (87 P. (2d) 766).

JURISDICTION

Petitioner invokes the jurisdiction of this court under Section 237 (b) of the Judicial Code as amended (U. S. C. A. 28:344 (b)).

Petitioner's supplemental brief correctly states the facts upon which jurisdiction of this court is based.

STATEMENT OF THE CASE

The case was presented to the Circuit Court of Oregon for Multnomah County, exercising probate jurisdiction, upon pleadings as enumerated in petitioner's supplemental brief and upon a written stipulation of facts embodied as Appendix A in petitioner's supplemental brief (p. 31). Petitioner's summary of facts is for the most part accurate except that counsel, in using their own language to summarize the stipulation, have inadvertently, we believe, created some impressions contrary to the facts as stipulated. Some additional facts should be called to the court's attention and some slight correction should be made in the statement by counsel for petitioner.

The question in this case is whether the Oregon Supreme Court was correct in holding that Oregon, the state of the domicile of Dr. Hayes, respondents' decedent, had no jurisdiction to levy an inheritance tax on a gift by decedent of federal reserve notes. The state court concluded that Oregon lacked jurisdiction because federal reserve notes are tangible personal property and the notes transferred by decedent had a

situs in Illinois at the time of the gift, and that taxation by Oregon of the transfer would constitute a violation of the Fourteenth Amendment to the Constitution of the United States.

For over ten years prior to August 15, 1935, Harris Trust and Savings Bank of Chicago, Illinois, as decedent's agent, had administered a substantial part of Dr. Hayes' property. Assets so administered were held by the agent in Chicago (R. p. 46).* On August 8, 1935, Dr. Hayes directed the Chicago agent to sell bonds and with the proceeds and with other credits to his account in the Chicago bank to buy federal reserve notes. That was done. On August 12, 1935, when the notes were so acquired, they were placed in Dr. Hayes' safety deposit box in a vault in Chicago (R. p. 47). On August 15, 1935, decedent, then in Oregon, executed a trust agreement conveying the notes irrevocably to Harris Trust and Savings Bank, as trustee of a trust for the benefit of decedent's daughter and son, their spouses and children. The trustee executed the agreement on August 17, 1935 (R. p. 48). On August 19, 1935, the first of the notes were removed from the box by the trustee. Thereafter, the trustee used the notes to purchase for the trust assets consisting of bonds and other personal property (R. pp. 48-49). It was stipulated that the gift was made by decedent in contemplation of his death (R. p. 48).

Counsel, at page 3, state that the securities owned by decedent had been in Chicago, Illinois, in the custody of Harris Trust and Savings Bank, his financial agent, "for some time" prior to the transfer by agreement dated August 15, 1935. The stipulation of facts

*References herein are to pages of record as reprinted in this court.

recites that that course of business had been in effect for "over ten years prior to August 15, 1935" (R. p. 46).

Counsel refer to two trusts, trusts Nos. 1 and 2. The facts relating to those trusts should be stated somewhat more fully. The first trust, the one directly involved, was created by the agreement dated August 15, 1935, by which decedent transferred federal reserve notes to the trustee. That trust was for the benefit of decedent's daughter and son, their spouses and children. Decedent retained absolutely no interest in the property transferred, in the trust estate, or in the income therefrom (R. pp. 25-37). The trust agreement was expressly made irrevocable (R. p. 37). Trust No. 2 was created by an agreement between decedent and the same trustee, dated September 19, 1935 (R. pp. 6-21). In that trust decedent reserved to himself the income for life (R. p. 7) with the provision that the income should go to his widow after his death for her life (R. p. 7) with remainders over to same beneficiaries as are named in the trust No. 1 agreement (R. p. 7, et seq.). In the No. 2 trust agreement decedent expressly reserved the right to revoke the trust or alter, amend, change or modify it (R. p. 19).

Respondents did not object to the imposition by Oregon of tax on gross estate which included assets of a value of $608,967.61 held by the trustee in trust No. 2 at the date of death (R. p. 22). Indeed, in the petition which respondents presented to the probate court for an order determining inheritance tax, they alleged that assets of trust No. 2 should be subject to tax (R. p. 3). The controversy between the parties relates to the propriety of the inclusion in the estate subject to

tax of the federal reserve notes transferred by the trust agreement dated August 15, 1935, to create trust No. 1.

At page 6, counsel recite that decedent executed the trust No. 1 agreement on August 15 and that it was executed by the trustee on August 17. Counsel proceed to say, "Thereafter, commencing August 19, 1935, the trustee, from time to time, reconverted the money into securities and other personal property (R. p. 119)". The stipulation of facts merely recites that from time to time, after August 19, federal reserve notes were removed from the safety deposit box where they were at the time of the gift and were "thereafter" used by the trustee to purchase bonds and other personal property for the account of trust No. 1. The stipulation does not recite how long the trustee retained possession of the federal reserve notes or when the actual purchases of bonds by the trustee began. So far as the stipulation shows, the interval between the taking of possession of the notes by the trustee and the use thereof by the trustee to purchase property for the trust may have been several weeks or longer (R. pp. 48-49).

Petitioner's summary of facts does not state the important fact that the assets purchased by the trustee for the account of trust No. 1 included no property ever owned by decedent. In particular, the trustee "did not purchase or otherwise acquire for said Edward Stephen Hayes Trust Number One any of the bonds or other assets which at any time were owned by decedent or which at any time constituted a part of the property held by said Harris bank as agent for decedent" (R. p. 49).

SUMMARY OF ARGUMENT

1. The transfer here in question was of federal reserve notes then located in Chicago, Illinois, and was not a transfer of anything else.

2. A federal reserve note is tangible personal property as distinguished from intangible personal property such as bonds, stocks, notes, mortgages, bank deposits, etc.

3. The state of the domicile of the decedent has no jurisdiction to tax a transfer of tangible personal property situated in another state. The imposition of a tax by the state of the domicile on the transfer of tangible personal property situated in another state would be in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The facts of this case show that the federal reserve notes transferred had a situs in Illinois so that the State of Illinois had jurisdiction over the property and over the transfer thereof. This conclusion is supported by the decisions of this court in cases involving jurisdiction of states to tax tangible personal property.

5. The fact that the owner of tangible personal property located in a state other than the owner's domicile may have a present intention to dispose of the goods or to move them to another location is immaterial in determining situs of tangible personal property.

6. It is not essential in order that an owner may establish a situs for tangible personal property in a state other than that of his domicile that he have a "business" purpose in placing the property in the other state.

7. The fact that a person adopts a certain course of conduct for the purpose of reducing or avoiding entirely tax liability is immaterial in determining whether a transaction is subject to tax. One may succeed in his desires to reduce or avoid liability for taxes if he adopts a course of conduct which produces a nontaxable result if his conduct is real and not merely a concealment of something different. In that event, his motive in adopting that course of conduct is immaterial.

ARGUMENT

I. THE TRANSFER WAS OF FEDERAL RESERVE NOTES AND NOTHING ELSE.

It is essential to emphasize that the transaction was a transfer of the specific federal reserve notes and of nothing else.

Prior to August 8, 1935, decedent owned certain bonds and credits to his account in his Chicago bank. The bonds were in Chicago in an agency account administered by the Chicago bank. That method of administration of decedent's property had been in effect for over ten years. (R. p. 46). He directed his Chicago agent to sell bonds in the open market. On August 12, 1935, with the proceeds of the sale of the bonds, together with other credits to his account in his Chicago bank, his Chicago agent purchased for him the federal reserve notes and the notes were placed in his safety deposit box in Chicago. The bonds initially owned by the decedent and the credits to his bank account were not the subject of the transfer because when the bonds were sold decedent was no longer the owner thereof and when the credits were

used in the purchase of the federal reserve notes decedent no longer owned them (R. pp. 46-47).

During the interval between the time of the acquisition by the decedent of the federal reserve notes and the completion of the transfer, decedent owned no property involved in this transaction which could have been the subject of the transfer other than the federal reserve notes.

After the transfer of the federal reserve notes was completed, the decedent had absolutely no right and no power whatsoever to direct or control the trustee with respect to the administration thereof. By the terms of the trust agreement the trustee was directed to invest funds from time to time available for investments and reinvestments "in whatever form of property, *real or personal*, the trustee in the exercise of its discretion shall deem proper and for the best interests of the trust estate, . . . " The only limitation on the power of the trustee to make investments was that investments should be approved by certain named persons other than the decedent (R. pp. 30-31).

After the gift was completed, the trustee invested the corpus of the trust, that is to say, it used the federal reserve notes to purchase in the open market income-bearing intangible personal property, but the intangible personal property so acquired by the trustee included none theretofore owned by the decedent and, in particular, included none of the bonds theretofore owned by the decedent which were sold to acquire the funds for the acquisition of the federal reserve notes (R. p. 49). That intangible personal property acquired by the trustee could not have been

the subject of any transfer by decedent because decedent never owned that property and never had any right to make any transfer of it.

The Oregon Supreme Court analyzed the facts in detail and reached the conclusion that this transfer was of federal reserve notes and of nothing else (28 Oregon Advance Sheets 103, 108, 86 P. (2d) 424, 427). We cannot see that there can be any difference of opinion on that question of fact.

Counsel for petitioner argue that respondents "take too narrow a view", and assert that the entire course of events, starting when decedent owned bonds and extending until after the gift, should be considered as a single event (Supplemental Brief, p. 8). But even though Dr. Hayes may have planned in advance every step right up to the actual gift, still, so long as he retained matters under his sole control so that he was free to change his mind and refrain from proceeding with the next step, each step constituted a separate transaction. If he had stopped anywhere short of the actual transfer by gift, there would have been no taxable event.

The court should then approach the case upon the premise that decedent, domiciled in Oregon, made a transfer of federal reserve notes then located in Illinois. The question to be answered is whether in the circumstances the Oregon Supreme Court was correct in holding that Oregon, the domicile of decedent, had no jurisdiction over the property because it was situated in Illinois, and that Oregon could not tax the transfer thereof.

II. A FEDERAL RESERVE NOTE IS TANGIBLE PERSONAL PROPERTY.

It is necessary to determine the character of the property transferred, that is, whether the federal reserve notes were tangible or intangible personal property. That question must be answered because the rules relating to jurisdiction to tax vary depending upon whether the property involved is intangible or tangible.

Although petitioner does not controvert our assertion that a federal reserve note is tangible personal property, we cite, for the convenience of the court, the authorities which support that conclusion.

This court held in *Blodgett v. Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749, that money consisting of bank notes and coins "is tangible property and cannot be distinguished" from the personal property consisting of paintings and furniture considered by the court in *Frick v. Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058.

In *Blodgett v. Silberman*, the court did not describe the money in question other than to refer to it as "bank notes and coin", but the court was apparently of the opinion that anything which passes current for money is tangible personal property.

In the present case the conclusion that a federal reserve note is tangible personal property is re-enforced by the fact that the statute includes federal reserve notes within the definition of "coins and currency" and makes them legal tender. See Act of May 12, 1933, 48 St. L. 52, as amended by Act of June 5, 1933,

48 St. L. 113 (U. S. C. A. 31:462). The statute as amended is quoted in full in the appendix, post, page 52.

Whatever is legal tender is tangible personal property. Legal tender is a thing having value in and of itself. Its value lies in the fact that it may be used to extinguish debts and obligations to pay money. It is not like a promissory note or bond or a written promise which is merely evidence of intangible rights to receive performance of the obligations therein expressed. If a federal reserve note were considered to be a written promise to pay money—mere evidence of a chose in action—then that promise could be satisfied by legal tender. But such a promise, which can be satisfied by the federal reserve note itself, cannot constitute a promise to make the note mere evidence of intangible rights. No such promise has value as such, and the sole value of the paper lies in the fact that it, as a tangible chattel, may be used to extinguish choses in action.

The ultimate question to be determined is whether in the circumstances the State of Oregon had jurisdiction over that tangible personal property by virtue of the fact that the owner was domiciled in that state.

III. THE STATE OF THE DOMICILE OF A DECEDENT HAS NO JURISDICTION TO TAX THE TRANSFER OF TANGIBLE PERSONAL PROPERTY SITUATED IN ANOTHER STATE.

A transfer of tangible personal property may be taxed only by the state of its situs. Taxation thereof by the state of the domicile when it is situated elsewhere is barred by the Fourteenth Amendment to the

Federal Constitution. *Frick v. Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058; *Blodgett v. Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749; *City Bank Farmers' Trust Co. v. Schnader*, 293 U. S. 112, 55 S. Ct. 29, 79 L. Ed. 228; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; *Delaware, Lackawanna, & Western Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669, 49 L. Ed. 1077.

Blodgett v. Silberman, supra, applied that rule to tangible personal property consisting of bank notes and coins located in a safety deposit box in New York, and held that Connecticut, the state of decedent's domicile, had no jurisdiction to levy an inheritance tax on the transfer thereof.

Blodgett v. Silberman has been followed in two state cases which applied the same rule to transfers of coins and currency. *Snodgrass Estate*, 20 Pa. D. & C. 598; *Waldron's Estate*, 84 Colo. 1, 267 Pac. 191.

The rule is otherwise with respect to transfers of intangible personal property. Ordinarily the state of domicile of the deceased owner has jurisdiction to tax the transfer of property of that type despite the fact that the physical evidence of the intangible rights is held and administered in another state. *Bullen v. Wisconsin*, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830; *Blodgett v. Silberman*, supra. Indeed it has been held that in some circumstances the state of the domicile is the only state which has jurisdiction to tax the transfer. *Farmers' Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371; *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed.

1056; *Beidler v. South Carolina Tax Commission*, 282 U. S. 1, 51 S. Ct. 54, 75 L. Ed. 131; *First National Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313.

In two very late cases it was held that in the circumstances therein shown the transfers of rights in intangible personal property might be subject to tax by both the state of the domicile of the decedent and the state wherein the evidences of intangible rights were being administered. *Curry v. McCanless*, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 865; *Graves v. Elliott*, 307 U. S. 383, 59 S. Ct. 913, 83 L. Ed. 880.

The reason for the difference in the rules relating to tangible property and intangible personal property has been discussed in many cases. The most recent statement on the subject by this court appears in *Curry v. McCanless*, supra, wherein the court said:

> "That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make disposition of putative rights in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since. Originating, it has been thought, in the tendency of the mind to identify rights with their physical subjects, see Salmond, Jurisprudence (2nd ed.) 398, its survival and the consequent cleavage between the rules of law applicable to tangibles and those relating to intangibles are

attributable to the exclusive dominion exerted over the tangibles themselves by the government within whose territorial limits they are found. (Citing cases.) The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax." (Citing cases.)

Unless, then, there are circumstances in the present case which remove it from the rules generally applied, it follows that Oregon, the state of domicile of decedent, had no jurisdiction over the tangible personal property consisting of federal reserve notes located in the State of Illinois, and had no jurisdiction to tax the transfer thereof. Under the rule applied in the cases

cited above relating to tangible personal property, the imposition by Oregon of a tax on the transfer of the property would violate the Fourteenth Amendment.

IV. THE GROUNDS RELIED UPON BY PETITIONER ARE INSUFFICIENT TO MAKE INAPPLICABLE TO THIS CASE THE GENERAL RULES DISCUSSED HEREINBEFORE.

We discuss in this subdivision the reasons asserted by petitioner in support of his contention that this case should be distinguished from cases cited and relied on by respondents. We have not followed precisely the order used by counsel in petitioner's supplemental brief, but we have endeavored to meet all grounds for distinction asserted by counsel.

A. The Federal Reserve Notes Were "Permanently Located" in Illinois.

One ground of petitioner for asserting that the rules stated above are not here applicable is that although the notes were physically present in Illinois, they did not have a situs in the legal sense in Illinois. Petitioner argues that situs is established only after the property has acquired "permanent location" and is "permanently located", and is "not merely transient, transitory or temporary but . . . fixed in an established abiding place" as those phrases are used in cases such as *Southern Pacific Company v. Kentucky*, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96; *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; and *City Bank Farmers' Trust Co. v. Schnader*, 293 U. S. 112, 55 S. Ct. 29, 79 L. Ed. 228. Petitioner argues that that essential element of permanency is absent in this case.

Questions relating to situs of tangible personal property cannot be resolved by resort only to such phrases. The word "permanent" is necessarily comparative and indefinite. Nothing other than real estate is situated permanently in one place, if the word "permanent" means perpetual or eternal. On the other hand, "mere physical presence" in a state other than the domicile of the owner is not necessarily sufficient to establish situs; and respondents have never taken such a position, as is attributed to them by counsel for petitioner (Supplemental Brief, p. 23). The line between facts sufficient to establish situs for tangible personal property physically present in a state and those which are insufficient can be located only as processes of judicial definition have placed close cases on one side or the other. As the number of judicial decisions increases and as close cases are decided, the position of that line of demarcation becomes apparent.

In his classic on the common law, the late Mr. Justice Holmes described that process of judicial definition in the following language:

> "The growth of the law is very apt to take place in this way. Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than of articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn

a little farther to the one side or to the other, but which must have been drawn somewhere in the neighborhood of where it falls." (Holmes, The Common Law, p. 127.)

If the phrases quoted by petitioner such as "permanent location" and "permanently located" are to be accepted as tests of jurisdiction, it is necessary to define those terms by references to specific cases located in varying degrees of proximity to the line between the existence and nonexistence of jurisdiction. It is not sufficient to do as counsel for petitioner have done, that is, to attempt to prove that the federal reserve notes did not have a situs in Illinois by showing that this case is not as far from the dividing line as the cases which petitioner cites.

On the side of the line where the state within whose geographical limits tangible personal property is located does not have jurisdiction are the transit cases. It is firmly established that where tangible personal property is in a state, but merely for purpose of transit in that state in interstate commerce, the state cannot impose a property tax thereon. To do so would impose a burden on interstate commerce in violation of the commerce clause (Art. I, Sec. 8, Constitution). *Coe v. Town of Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715; *Kelley v. Rhoads*, 188 U. S. 1, 23 S. Ct. 259, 47 L. Ed. 359; *Champlain Realty Co. v. Town of Brattleboro*, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309. Cf. *American Express Co. v. Iowa*, 196 U. S. 133, 25 S. Ct. 182, 49 L. Ed. 417.

On the other side of the line are the cases the facts of which satisfy the test stated in *Minnesota v. Blasius*,

290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131, wherein the court said:

> "Where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the state and is thus subject to its taxing power."

It may be difficult in a given case to determine whether transit in interstate commerce has begun or ended, but when that fact question is answered, the legal conclusion is reached without difficulty.

There are several cases much closer to the line than the present case which, we believe, compel the conclusion that the federal reserve notes had a situs in Illinois at the pertinent time and consequently were not subject to the jurisdiction of Oregon.

In *Brown v. Houston*, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257, this court considered the power of the State of Louisiana to levy a personal property tax on coal owned by residents of Pennsylvania. The coal had been mined in Pennsylvania and had been moved by barges to New Orleans and at the pertinent time was being held on barges at New Orleans for sale. The court held that the coal had a taxable situs in Louisiana. The court said:

> "It (the tax) was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the

market of New Orleans. It might continue in that condition for a year or two years, *or only for a day.*" (Italics ours.)

Situs, then, may be "permanent" even though "only for a day". See, in accord, *Pittsburgh & Southern Coal Co. v. Bates*, 156 U. S. 577, 15 S. Ct. 415, 39 L. Ed. 538.

Indeed chattels brought into a state for the sole purpose of temporary storage and reshipment into other states have a situs at the place of storage despite the intention of the owner that they shall shortly be moved outside of the state. This principle was applied in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538. In that case plaintiff was a manufacturer of nails, wire and other material at plants outside of Tennessee. The method by which it conducted its business was generally as follows: It shipped goods to Memphis, Tennessee. At that point they were received by a transfer company which placed them in storage temporarily and then reshipped the goods out of storage in original packages to destinations, for the most part, outside of the City of Memphis and outside of the State of Tennessee. This court held that under that practice the goods acquired a situs in Memphis when they were received and stored even temporarily at that point, and were subject to tax at that location.

The same principle was applied in *General Oil Co. v. Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754. In that case plaintiff produced and refined petroleum products at plants in Pennsylvania and Ohio. Products so produced were shipped in tank cars to a storage

plant at Memphis, Tennessee. The oil was unloaded at Memphis only for repackaging and distribution in smaller containers to purchasers in states other than Tennessee. In fact, the products for which contracts of sale had already been made were, on arrival at Memphis, placed in tanks marked "Oil already sold in Arkansas, Louisiana and Mississippi". The oil so sold, segregated and marked remained in Tennessee only a few days and only long enough to be properly packaged and distributed according to orders. In those circumstances, this court held that the property acquired a situs for taxation in Memphis.

In *Bacon v. Illinois*, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615, this court sustained the power of the State of Illinois to tax grain located in the owner's warehouse in Illinois. The circumstances relating to the purpose of the storage and the owner's intentions with respect thereto were as follows: The grain had been shipped by the original owners from southern and western states, consigned to New York and Philadelphia. The contracts for carriage reserved to the owners the right to remove the grain from cars at Chicago for temporary purposes of inspecting, weighing, grading, mixing, etc. Bacon purchased the grain while it was in transit to Chicago and succeeded to the rights of his vendors under the contracts of shipment. At Chicago he removed the grain from the cars to his private elevator. "This removal, . . . was for the sole purposes of inspecting, weighing, grading, mixing, etc., and not for the purpose of changing its ownership, consignee or destination." No part of the grain was sold or consumed in Chicago but all of it was later shipped to the destinations specified. The court held

that Illinois had power to tax the grain. The court pointed out that while the grain was in Chicago the owner had full possession of the grain and that his intention to send it to another state and there dispose of it was not controlling. The court said:

> "He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation."

In *Minnesota v. Blasius*, supra, the State of Minnesota attempted to assess and levy a tax on eleven head of cattle owned by defendant, Blasius, and held by him in the stockyards at South St. Paul, Minnesota, on May 1, 1929, the assessment date. Blasius was in the business of buying and selling livestock in that market. He did not sell for slaughter but resold to those engaged in feeding cattle. The particular animals were purchased by Blasius on April 30, 1929. Seven of the eleven head were sold by him on May 1 to a nonresident purchaser and were immediately shipped to points outside of Minnesota, and the remaining four head were similarly sold and shipped on May 2. This court held that Minnesota had power to levy the tax and used the language hereinbefore quoted (ante, p. 18).

Phrases such as "permanently located" and "established abiding place" cannot be used without further definition as tests of the existence of jurisdiction. The decisions in cases closer to the line than were the cases in which the phrases were used teach us the correct

and more precise meaning. From the cases we learn that on one side of the line fall the transit cases and on the other side of the line are cases such as those just cited where the duration of location in a given state was very brief. From those cases where the duration of situs was short, but still sufficient to establish a taxable situs in the state of physical presence, we learn that location may be "permanent" even though it is "only for a day" (*Brown v. Houston*, supra), or only long enough to repackage and reship to other states to fill orders already received (*General Oil Company v. Crain*, supra), or only long enough to inspect, weigh, grade, mix, etc., prior to reshipment to a previously determined destination in another state (*Bacon v. Illinois*, supra), or only long enough to resell and reship out of the state, which consumes only a day (*Minnesota v. Blasius*, supra). If the property is at rest in a state subject to the dominion of the owner to hold or dispose of it as he wishes, it is "permanently located" and has an "established abiding place" in that state and has a situs at that place (*Minnesota v. Blasius*, supra).

If that test is applied to the facts of this case, the conclusion must be that the federal reserve notes transferred by decedent had a situs in Illinois at the time of the transfer. At that time they were located in Dr. Hayes' safety deposit box in Chicago. They were subject to his and only his dominion and control. So long as he owned the notes he had the right and the sole power to hold them or dispose of them as he alone wished. Dr. Hayes at that time was free to hold the notes indefinitely or to dispose of them by gift or by any other process. If, between the time when he

acquired the notes and the time he gave them away, he had changed his mind, as he was free to do, and had elected not to make the gift, he could have done so without responsibility to anyone.

The conclusion that the notes had a situs in Illinois becomes clearer if we consider facts in an assumed situation. Let us suppose that at the time Dr. Hayes decided to purchase federal reserve notes, the supply of notes available in Chicago or in Illinois was insufficient to meet his requirements so that his agent in Chicago was required to procure the notes from the federal reserve bank in New York. After the notes had been thus procured and shipped to Chicago and while they were in transit across the intervening states of Pennsylvania, Ohio and Indiana, they would not have acquired a taxable situs in any one of the intervening states because they would have been in transit in interstate commerce. However, when they arrived in Chicago and had come to rest and had been placed in a safety deposit box subject to the dominion of Dr. Hayes to keep or dispose of them as he wished, they acquired a situs for taxation in Illinois. If they were the type of property which under the Illinois statute was subject to personal property tax, there can be no question but that at the termination of the transit and at the time of the placement in the box in Chicago, they would be subject to the jurisdiction of the State of Illinois for tax purposes. If they then had a situs in Illinois for tax purposes, it is clear under the authority of the cases which we have cited that no state other than Illinois would have had jurisdiction to levy a tax upon the transfer thereof.

The stipulation of facts upon which the present case was presented to the lower court and to the Oregon Supreme Court does not state the source from which Dr. Hayes' agent acquired the federal reserve notes when it purchased them for Dr. Hayes. The stipulation merely recites that the notes were in Illinois at the time of the transfer, that they had never been within the State of Oregon prior to the acquisition by Dr. Hayes, and to the knowledge of the parties have never since been in the State of Oregon. (R. p. 47).

If they were acquired through some transit process as suggested in the assumed case, they acquired a situs in Illinois at the termination of the transit. If they were acquired by the agent directly from some financial institution in Chicago so that they were not in transit immediately prior to the purchase thereof by Dr. Hayes, it follows with greater force that they had a situs in Illinois prior to the purchase by Dr. Hayes and continued to have a situs in Illinois when they were purchased by him and placed in his safety deposit box.

Thus far we have considered the case to show that the notes had a situs in Illinois because they were at rest in the state subject to the dominion of the owner, and have not discussed other facts which show additional elements of permanency. Dr. Hayes for over ten years prior to 1935 had handled a substantial part of his business of investing his property and collecting principal and income through his agent, Harris Trust and Savings Bank, in Chicago. His securities thus administered were at all times in Chicago. Income and principal, as collected, were deposited to his checking account in the bank at Chicago. No business

of any nature with respect to that portion of his property was handled elsewhere. Dr. Hayes moved to Oregon in September, 1933, and before that had been domiciled for over fifty years in Wisconsin. The business practices here described were adopted, then, many years before he came to Oregon. His change of residence made no change in his methods of conducting his financial affairs in Chicago through his Chicago agent (R. pp. 45-46).

There have been many cases decided by this court which hold that if a person conducts a business in a state other than the state of his domicile, intangible personal property associated with that business may be subject to tax by the state in which the business is conducted. *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143, and cases cited. The Oregon Supreme Court, in its decision on rehearing, held that the circumstances with respect to the administration of Dr. Hayes' intangible personal property in Illinois over that long period were sufficient to establish a business situs for his intangible personal property in Illinois (28 Oregon Advance Sheets 403, 408, 87 P. (2d) 766, 768).

The fact that the intangible personal property may have had a business situs in Illinois did not necessarily preclude the imposition of personal property taxes on that same property by Wisconsin while Dr. Hayes was domiciled there and by Oregon after he moved to Oregon. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 38 S. Ct. 40, 62 L. Ed. 145; *Cream of Wheat Co. v. Grand Forks County, North Dakota*, 253 U. S. 325, 40 S. Ct. 558, 64 L. Ed. 931; *Curry v. McCan-*

less, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 865. Indeed, respondents, without objection, paid inheritance tax to the State of Oregon determined upon the basis of the assets of the revocable trust established by Dr. Hayes by an agreement dated September 19, 1935, of which Harris Trust and Savings Bank was trustee, wherein Dr. Hayes reserved the income for life and which was being administered by the trustee in Chicago at the time of his death. See *Bullen v. Wisconsin*, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830; *Graves v. Elliott*, 307 U. S. 383, 59 S. Ct. 913, 83 L. Ed. 880.

The fact of the long-continued practice of administration of intangible personal property in Chicago is important, quite aside from the question of whether or not that property, while so administered, was subject to personal property tax by Illinois or Oregon or both, because it showed Dr. Hayes' intent that his property should remain in Illinois. For his tangible personal property, to which the fiction of *mobilia sequuntur personam* does not apply, the conclusion is re-enforced that the situs was in Illinois, however brief the duration of that situs may have been for individual items of tangible property. That conclusion of the Oregon Supreme Court in its decision denying the petition for rehearing is correct (28 Oregon Advance Sheets 403, 408, 87 P. (2d) 766, 768).

Counsel rely on *Southern Pacific Company v. Kentucky*, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96. In that case the court held that Kentucky, the state of incorporation of the owner, had jurisdiction to tax ocean-going vessels because the vessels had not ac-

quired a situs elsewhere. The rules relating to situs of vessels are peculiar to that type of property and are not applicable to tangible personal property generally. Cooley, on Taxation (4th Ed.), Sec. 453. That difference was recognized by this court in *City Bank Farmers' Trust Co. v. Schnader*, supra, wherein the court said:

> "In respect of situs for taxation, the collection of portraits is quite unlike vessels and railway rolling stock that in fulfilling the purpose for which they are created move from place to place and into different states."

Tangible personal property in transit does not acquire a situs in a state through which it passes. By a parity of reasoning the vehicle in which the property is carried in transit acquires no situs. Cases relating to vessels used in interstate and foreign commerce are to be distinguished, as this court has done, from those relating to tangible personal property generally.

Counsel recite the facts in *Frick v. Pennsylvania*, supra, *Blodgett v. Silberman*, supra, *Union Refrigerator Transit Co. v. Kentucky*, supra, and *City Bank Farmers' Trust Company v. Schnader*, supra. In those cases the situs in the state other than the domicile had been of longer duration than in the case at bar and in none of them was there any showing of present intention of the owner to dispose of the goods or to change the situs. From those cases counsel conclude that the federal reserve notes in this case had not acquired an Illinois situs at the time of the gift because the duration of situs was not as long as in the cases cited. Counsel's conclusion is, we believe, erroneous. Counsel rely

on cases which cluster around the pole, to use Mr. Justice Holmes' metaphor. It does not follow, because the case at bar is not as near to the pole as are the cases cited by counsel, that it is not on the same side of the line.

The authorities which we have cited in the preceding pages establish, we believe, that the case at bar is on the same side of the line as *Frick v. Pennsylvania* and other cases relied on by counsel. The element of permanency was present in this case.

B. Tangible Personal Property May Have a Situs in a State Despite the Intention of the Owner, at the Time Situs Is Established, to Dispose of the Goods or Move Them in the Immediate Future.

A second ground upon which petitioner bases his assertion that the federal reserve notes did not have a situs in Illinois is that situs cannot be acquired unless it appears that the owner has no present intention to dispose of the goods or move the property from the state. Counsel argue that because when Dr. Hayes acquired the federal reserve notes he intended to dispose of them in the near future they did not acquire situs in Illinois. Petitioner's argument is, we believe, based upon a misconception of the law.

Dr. Hayes had no intention to remove the federal reserve notes from Illinois so long as he owned them. After he had disposed of the notes and had ceased to own them, it was immaterial to him whether the notes remained in Illinois or were sent elsewhere.

In *Coe v. Town of Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715, part of the property which was considered consisted of logs which had not yet entered upon transportation to another state, but as to those the facts showed that the owner intended that they should shortly be started on their journey in interstate commerce. The court held that the intention of the owner to remove the property from the state did not affect the jurisdiction of the state where the logs were located so long as they were not actually started on their journey in interstate commerce. In *General Oil Company v. Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754, the court sustained the jurisdiction of the State of Tennessee to tax property in that state when the facts showed an intent by the owner to ship the property from the state in the immediate future and the owner stored the property while in the state in tanks marked to indicate that purpose. In *Bacon v. Illinois*, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615, the ultimate destination of the grain in New York and Philadelphia and other eastern cities was determined before Bacon, the owner at the pertinent time, acquired title to the grain. The removal of the grain from railroad cars to the owner's elevator was not for the purpose of changing its ownership, consignee, or destination, and the facts showed that all of the grain was later shipped to the destinations originally specified in accordance with the purpose determined even before Bacon acquired the grain. In sustaining the jurisdiction of the State of Illinois, where the grain was then located, to tax the grain, the court said:

"But neither the fact that the grain had come from outside the state, *nor the intention of the owner to send it to another state*, and there to dispose of it, can be deemed controlling when the taxing power of the State of Illinois is concerned." (Italics ours.)

Counsel have reached an erroneous conclusion by reliance only on cases where the facts showed no intent of the owner to dispose of the goods or move them in the immediate future, and by disregard of other cases which hold that situs may exist despite a positive showing of the owner's intent to dispose of the goods or move them from the state in the immediate future.

C. The Owner Need Have no "Business Purpose" in Placing Property in Another State in Order to Establish Situs.

A third ground advanced by petitioner for distinguishing this case from the cases applying the general rules is, apparently, that situs cannot be established unless there is present some business purpose for placing the property in a state other than that of the domicile of the owner. Petitioner cites no authority to indicate that the presence of a business purpose is essential. Petitioner merely cites cases wherein the facts showed a business purpose and concludes that a business purpose is indispensable to situs. It is on that ground that counsel distinguish *Brown v. Houston*, supra, and other cases discussed in earlier pages of this brief (ante, pp. 18-22).

But the very cases on which counsel rely in other respects refute the idea that business purpose is essential. Thus, in *City Bank Farmers' Trust Co. v.*

Schnader, supra, the court held that an art collection loaned for the purpose of exhibition in a state other than that of the owner's domicile had a situs in that other state; and in *Frick v. Pennsylvania*, supra, furnishings of a country estate in Massachusetts were held to have a situs in a state other than the domicile. An exhibition of an art collection is not a business, and the use of furnishings in a summer home is not business. At least if such things do constitute business, then the direct management of financial affairs by a Chicago agent, which was the fact in the present case, is business.

It is not necessary, we submit, to have present an element of business in the purpose of the owner in placing tangible personal property in a state in order to give that property a situs in that state.

D. It Is Immaterial that a Taxpayer's Motive in Adopting a Course of Action Is to Reduce or Avoid Taxes.

The final ground upon which petitioner relies in asserting that this case is not governed by the general rules is that in the present case the sole purpose of the decedent in establishing a situs in Illinois for the property which was the subject of the gift was to be able to make a gift without liability to the State of Oregon for any transfer tax. As stated by counsel:

> "Such jurisdiction is not defeated by a change in the nature of the gift or of its location when made for the purpose of evading the tax." (Petitioner's Supplemental Brief, p. 11.)

The fact that a man's motive in adopting a certain course of action is to avoid taxes is immaterial in deter-

mining the extent of his tax liability. That principle has been recognized by this court on several occasions.

Thus, in *United States v. Isham*, 17 Wall. 496, 21 L. Ed. 728, wherein the Government sought to condemn conduct by defendant as a device to avoid payment of stamp duty and as a fraud on the revenue law, the court gave two answers, the first of which was phrased as follows:

> "That if the device is carried out by means of legal forms, it is subject to no legal censure."

In *Bullen v. Wisconsin*, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830. Mr. Justice Holmes made the following often-quoted statement:

> "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits."

In *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 50 S. Ct. 169, 74 L. Ed. 504, wherein it was asserted that a taxpayer had adopted a certain procedure in order to evade taxes, the court said:

> "The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it."

In *Gregory v. Helvering*, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, the court said:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or

altogether avoid them, by means which the law permits, cannot be doubted."

If a statute imposes a tax on certain transactions a man is free to avoid the tax by refraining from transactions covered by the act. Thus, if an automobile owner wishes to avoid or reduce taxes on the sale of gasoline, he may do so effectively merely by refraining from purchasing gasoline and accepting the inconvenience of being without automobile transportation. Furthermore, if by acting in a particular way he can reduce his tax liability, and if he takes affirmative action to put himself into the more favored tax class, he will succeed in reducing his taxes even though that was his plain intent. Thus, an investor who owns securities the income from which is taxable may sell those securities and purchase tax exempt securities with the resulting disadvantage of reduced income. He will succeed in reducing his taxes even though that was the primary purpose which motivated him.

Of course, if a man acts under a misconception of existing law and a court of last resort later determines that his interpretation of the law was wrong, he may fail in his efforts to reduce his taxes; but his failure does not depend upon the fact that his motive in adopting a particular course of action was to reduce taxes. That was the situation in *Gregory v. Helvering*, supra. The taxpayer, to reduce her taxes, adopted a plan which she, from her reading of the revenue act, believed to be a tax-free transaction. She failed, not because she was motivated by a desire to reduce taxes, but because the court determined that her interpretation of the act relating to reorganization of corpora-

tions was different from that which the legislature intended.

Most of the so-called tax avoidance cases which come before the courts are not within the categories discussed in the preceding paragraphs. For the most part the decisions involve cases wherein the taxpayer adopts a certain course of conduct and the tax collector asserts that the actual transaction was not that which it appeared to be on the surface, or that which the taxpayer endeavored to make it appear to be. In such cases, if the taxpayer can establish that his transaction was in fact that which it appeared to be and was one which removed him from the reach of the taxing statute, he will be successful in his efforts to reduce his taxes. On the other hand, if the tax collector can show that the transaction was not real or was not in fact that which it appeared to be on the surface, the taxpayer will be unsuccessful in his attempt to reduce his taxes.

The test to be applied in cases of that nature was stated in *Chisholm v. Commissioner*, 79 F. (2d) 14, certiorari denied, 296 U. S. 641, 56 S. Ct. 174, 80 L. Ed. 456, wherein Circuit Judge Learned Hand wrote as follows:

> "The question always is whether the transaction under scrutiny is in fact what it appears to be in form; a marriage may be a joke; a contract may be intended only to deceive others; an agreement may have a collateral defeasance. In such cases the transaction as a whole is different from its appearance. True, it is always the intent that controls; and we need not for this occasion press

the difference between intent and purpose. We may assume that purpose may be the touchstone, but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation which the apparent, but not the whole, transaction would realize."

In a recent text, Paul, Studies in Federal Taxation (1937), the author, after reviewing many decisions of this court and lower federal courts, summarizes the principles of so-called tax avoidance cases as follows:

"Even in the most involved case the court reaches its conclusion in a very simple way. It tests the allegations as to what has been done by asking whether the taxpayer intends to abide by what he has done. Are his transactions real in the sense that he will live by them in the future? Does the form acquire substance in the sense that the taxpayer will accept the disadvantages, as well as the advantages, of what he does? Is he prepared to abandon and relinquish the benefits of the conditions existing prior to his tax-avoiding transaction? If he is, the transaction is real. (pp. 136-137.)

. . . . . .

"There is in all tax avoidance cases the same element of election. The taxpayer chooses between alternatives to each of which he has an equal right, but both of which he cannot have. He cannot change his position, or play fast and loose with the consequences of what he has done. If he is ready to accept consequences, he may avoid tax. If he dodges consequences, his attempt to avoid will fail." (p. 140.)

The same thought is expressed in Cooley, on Taxation (4th Ed.), Sec. 548 (cited by counsel for petitioner, Supplemental Brief, p. 13). Therein, after stating circumstances in which a taxpayer may succeed in reducing taxes, the author says:

> "On the other hand, taxation cannot be avoided (1) by a plan in itself unlawful or (2) by a plan lawful in itself, *not actually carried out*, which is a mere subterfuge to escape taxation." (Italics ours.)

Two decisions written by the same Circuit Judge, which involve facts substantially similar in all respects but one, will illustrate the distinction between the cases wherein a taxpayer is successful in avoiding taxes and one wherein he is not. The cases are *Commissioner v. Riggs*, 78 F. (2d) 1004, and *Commissioner v. W. F. Trimble & Sons Co.*, 98 F. (2d) 853. In the *Riggs* case the court followed in large measure the reasoning of the court in the Second Circuit in *Commissioner v. Dyer*, 74 F. (2d) 685, a companion case involving identical facts. In both the *Riggs* and *Trimble* cases the actions of the respective taxpayers were motivated by desires to reduce income taxes. In both the taxpayer sold securities for the purpose of establishing deductible losses. Both arose under revenue acts substantially the same which denied to the taxpayer the right to deduct losses from sales if within thirty days before or after the sale the taxpayer has acquired or entered into a contract or option to acquire substantially identical securities. In both cases the taxpayer sold securities near the end of a calendar year and reacquired the same securities after the beginning of the next calendar year, but at a time more than thirty

days after the date of the sale. The taxpayer failed in his effort to avoid taxes in the *Riggs* case but succeeded in the *Trimble* case.

The essential difference between the two cases lies in the fact that in the *Riggs* case, although there was no express contract by which the taxpayer acquired the right to repurchase the property, there was in fact at the time of the original sale an agreement or understanding that the taxpayer would repurchase. On the other hand, in the *Trimble* case there was in fact no contract or agreement or option relating to a repurchase, and the repurchase when made was an independent transaction not related to the original sale by the taxpayer. In the *Riggs* case the transaction carried through in the form of a sale was not in fact a sale; it was not real. In the language of Judge Learned Hand, the original agreement for sale had "a collateral defeasance". On the other hand, in the *Trimble* case the original sale was real. Thereby the taxpayer cut all strings on any rights in the thing sold. In the language of the text writer quoted above, the taxpayer in the *Trimble* case was prepared to "live by" his sale "in the future" and was prepared to "accept the disadvantages as well as the advantages" of what he did.

There is a type of case of somewhat different nature which is illustrated by *Minnesota Tea Co. v. Helvering*, 302 U. S. 609, 58 S. Ct. 393, 82 L. Ed. 474. In that case the corporation had assets consisting of cash to the extent of $426,000, and was indebted to others to the extent of $106,000. If the full amount of the cash could have been distributed to its stockholders as a step in a reorganization, none of the cash would have been subject to payment of tax by the corporation.

If a part of the cash necessary to pay debts had been paid direct to creditors, that part would have been subject to the payment of tax by the corporation. In those circumstances the corporation's stockholders adopted a resolution directing the distribution of all the cash to the stockholders upon the promise of all stockholders to assume and pay the debts of the corporation. That was in fact done. The court held, however, that the corporation was subject to tax upon the $106,000 just as though the corporation had paid that amount direct to its creditors. The court said:

> "A given result at the end of a straight path is not made a different result because reached by following a devious path."

If a taxpayer wishes to accomplish a given result and that very result produces liability for taxes, his taxes will not be reduced merely because he adopts a scheme for accomplishing the result more elaborate than one which would produce the result directly. If he insists on control of the situation—if he keeps the reins in his own hands—so that he can be sure that there will be no deviation from the circuitous path until the end he desires is attained, his tax liability will be the same as though he had pursued a direct course. The intermediate steps, wholly unnecessary, do not alter the fact that the elaborate transaction is in essence precisely the same as the taxable direct transaction. The fact that a desire to reduce taxes moved him to adopt the circuitous route is immaterial. The material thing is that a transaction, controlled by him from its inception to its conclusion, is a single transaction even though more elaborate than necessary.

Let us apply the principles discussed in earlier pages to the facts of the present case.

Was the transaction in the present case real? The first step in the transaction was the sale of bonds owned by Dr. Hayes. Those were actual sales made in the open market and when the sales were made Dr. Hayes cut all strings which he had ever had on the bonds. Of necessity he had to live by the consequences of that act. Bonds fluctuate in value from time to time. If, after the sale of those bonds, market prices of bonds had risen, Dr. Hayes could not have reaped any benefit. When he made those sales, he committed himself to the acceptance of the possible disadvantage of a market rise. After that first step he was free to go on as he did or to stop there. His second step was the purchase of federal reserve notes. At that time he owned no property involved in this transaction and had no strings on any property other than the federal reserve notes. Again, at that point he was bound to no one and could have changed his mind with responsibility to no one. His third step was the transfer of those notes by gift. There was nothing unreal or fanciful or pretended in that gift. The agreement is set out in full in this record and petitioner has not asserted and will not assert that the transfer was anything different than it appears to be on its face.

When the transfer was completed, Dr. Hayes' interests ceased. After the trustee received the gift it was free to invest the corpus of the trust in real or personal property (R. p. 30). The manner in which it exercised that discretion could have had no effect on the preceding conduct of Dr. Hayes and could not

have made taxable a transaction theretofore completed and which was not subject to tax.

This case is not one such as the *Minnesota Tea Company* case. To make this clear, we will assume facts which might be within the principle of that case. Assume that Dr. Hayes owned 450 bonds of the denomination of $1000 each. He desired to make a gift of those specific bonds but in a manner so that the transfer would not be subject to Oregon tax. Since the bonds were intangible personal property, a direct gift of the bonds in contemplation of death would be subject to Oregon inheritance tax because, ordinarily, intangible personal property has a situs for inheritance tax purposes at the domicile of the owner. Consequently he developed a complete plan with his Chicago bank, which was to be named as trustee, and he carried through that plan step by step. He borrowed on his personal promissory note $450,000 from the Chicago bank and pledged the 450 specific bonds as collateral. With the proceeds of the loan he purchased federal reserve notes in the amount of $450,000. He then executed a deed of gift of the notes to the Chicago trustee. The trustee, in accordance with the original provisions of the plan, used the notes to pay off the loan and took as assets of the trust estate the 450 specific bonds pledged with the bank and theretofore owned by Dr. Hayes. In the circumstances thus assumed, the net result of the entire transaction would be that title to specific intangible personal property owned by Dr. Hayes would vest in the trustee. Furthermore, while that transaction was in progress and while Dr. Hayes was nominally the owner of the federal reserve notes, the notes would not be subject to

his full dominion and control because the bank would have a string on them. That string, that right in the bank to control the notes, would be the result of the agreement between Dr. Hayes and the bank that as soon as the deed of gift was executed the bank would forthwith take possession of the notes to pay off the loan and release the collateral. Likewise, during the entire transaction, by virtue of his agreement with the bank, he would have a string on the bonds until title thereto vested in the trustee. In those circumstances Dr. Hayes would have assumed absolutely no risk different from that which would have accompanied a direct gift of the specific bonds to the trustee.

In those assumed circumstances the net result of the entire transaction would be a transfer of specific intangible personal property from the owner to the trustee. The ultimate result of the transaction would be precisely the same as that of a direct transfer from the owner to the trustee without the use of the mechanism of the promissory note and the federal reserve notes. The direct transaction would have been taxable by Oregon, the state of Dr. Hayes' domicile. Under the rule of the *Minnesota Tea Company* case, the indirect transaction which accomplished the same result by the devious path would likewise have been subject to tax by the state of Dr. Hayes' domicile.

But the facts in this case are different. The transaction here involved was a transfer of federal reserve notes. It was not a transfer of intangible personal property originally owned by Dr. Hayes because those securities were sold in the open market and title thereto was never vested in the trustee. It was not a

transfer of property acquired by the trustee by the use of the federal reserve notes after the trust was created because Dr. Hayes never owned or had any interest in that after-acquired property.

The present case was not a transfer of intangible personal property by a devious path. It was a transfer of tangible personal property situated in Illinois—a transaction not subject to tax. The transaction was real. There was nothing concealed about it. Dr. Hayes was not doing one thing and at the same time calling it something different. The transaction did not produce a taxable result and it is immaterial that Dr. Hayes' motive in acquiring tangible personal property situated in Illinois for the purpose of transferring that specific property to the trustee may have been to reduce taxes otherwise payable to the State of Oregon.

The authorities cited by counsel for petitioner (Supplemental Brief, pp. 11-21) are distinguishable.

The first authority cited is *Shotwell v. Moore*, 129 U. S. 590, 9 S. Ct. 362, 32 L. Ed. 827. In that case the taxpayer, a few days before the date fixed by the state statute for assessment for personal property generally, used a balance on deposit in a bank and purchased federal legal tender notes or greenbacks. On the assessment date he owned the greenbacks. A few days later he redeposited them to his credit in the same bank. Greenbacks by federal statute were exempt from state tax. The taxpayer resisted the state tax upon the ground that Ohio had no right under the federal statute to tax greenbacks. The court discussed the question of whether in those circumstances the taxpayer would have a defense at law to resist pay-

ment of the tax if the tax were in fact a tax on the greenbacks but specifically refrained from deciding that point. The Ohio statute, quoted in the margin of the opinion of the Supreme Court at page 594, imposed a tax on personal property including,

> ". . . sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into, bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; . . ."

The court said at page 597:

> "Waiving the question whether these equitable considerations would constitute a defense in an action at law to collect the tax in suit, we proceed to inquire whether the statute of Ohio made all assessments for taxes relate by an iron rule to the day preceding the second Monday in April, and to property possessed on that particular day, and that only. Is such a construction of the law of the State of Ohio a proper one?"

The court then proceeded to construe the statute quoted above and concluded that the tax in question was not a tax on greenbacks but was a tax on the average amount of credits owned by the taxpayer within the preceding year and invested in or converted into tax-exempt greenbacks. The court, at page 600, said specifically that the tax was not a tax on securities of the United States but was a tax on other investments and moneys on deposit subject to order.

The decision of the court in that case, resting as it did on an interpretation of the Ohio statute which did not impose a tax on greenbacks, is no authority to support a conclusion that, if the tax were to be determined on the basis of property held on a single day and if on that day the taxpayer had owned greenbacks, the tax could have been imposed if it were proved that the taxpayer's purpose in acquiring the greenbacks was to reduce his state taxes.

Counsel for petitioner cite the case as holding that the attempt at fraud on the revenue law was sufficient to defeat the taxpayer's purpose. Although the court expressed its disapproval of the conduct of the taxpayer, the court did not adopt any such rule and did not hold anything opposed to the later cases of this court which we have cited. The taxpayer's purpose in particular conduct is immaterial if he in fact does that which he purports to do. The *Shotwell* case does not hold that the purpose of the taxpayer will alter the result. It merely holds that the tax there imposed was a tax on credits held during the year by the taxpayer and was not a tax on greenbacks.

The Oregon Supreme Court reviewed the *Shotwell* case and recognized that it was to be distinguished from the case at bar on substantially the grounds as we have outlined them (28 Oregon Advance Sheets 103, 125, 86 P. (2d) 424, 433).

In *Brock & Co. v. Los Angeles County*, 8 Cal. (2d) 286, 65 P. (2d) 791, the facts were that the taxpayer, domiciled in California and engaged in the jewelry business, transported a large stock of jewelry from California to Hawaii and held it there until the tax

assessment date had passed and then returned it to California. In holding that California had jurisdiction to tax, the court had to distinguish cases such as *Brown v. Houston* and *General Oil Company v. Crain* cited in earlier pages. The California court asserted that such cases were distinguishable because therein the facts showed no intent on the part of the owner to return the goods to the state of the domicile. If that is a sound distinction, the California case is still no authority opposed to respondents' contentions here. In the present case the federal reserve notes never were in Oregon prior to acquisition by Dr. Hayes, they were in Chicago all the while he owned them and, to the knowledge of the parties, have never since been in Oregon. Dr. Hayes did not take the notes out of Oregon and he never intended to bring them into Oregon.

Whiting Finance Co. v. Hopkins, 115 Cal. App. 756, 2 P. (2d) 461, and *West Virginia Mortgage & Discount Corporation v. Newcomer*, 101 W. Va. 292, 132 S. E. 748, are essentially the same. In both, the taxpayer, in order to establish deductible debts, executed notes for large sums shortly before the assessment date, purchased government bonds, and shortly after the assessment date sold the bonds and satisfied the notes. In the West Virginia case, there was some question whether the bonds were ever actually purchased. In both the purpose was to reduce taxes.

The California statute taxing credits permitted a deduction of "the *just* debts owing by him". The court in effect held that the debt incurred in those circumstances was not a "just" debt. The case depended upon the meaning of the California statute and no constitutional question was involved.

The West Virginia case is an excellent example of the type described by Judge Learned Hand in *Chisholm v. Commissioner*, supra, which we have quoted. The purported contract was not real; it was utterly different from that which it appeared to be on the surface.

We cannot reconcile the case of *In re People's Bank of Vermont, Ill.*, 203 Ill. 300, 67 N. E. 777, with the position respondents take in this case, or with the decisions of this court. While recognizing the right of a taxpayer to purchase tax-exempt property, the Illinois court apparently took the position that every transaction, the purpose of which is to reduce taxes, is "fraudulent in law". If that was the Illinois law in 1903, it certainly is not the law now recognized in the decisions of this court cited above.

In *Durham v. Anderson*, 6 Ind. App. 23, 32 N. E. 104, the taxpayer had a time deposit in a bank drawing interest. Shortly before the tax assessment date he wrote a check on the bank and the amount thereof was delivered to him in greenbacks. The greenbacks were left with the bank. Indeed, they were a part of the bank's reserve, and if the taxpayer was in fact the owner thereof, the bank's reserve was illegally depleted. Shortly after the assessment date, his account was credited with the amount of the greenbacks. The bank paid interest on the full balance of his account without deduction on account of the reduction thereof by the transaction described. The suit was not for the tax but was for penalty for fraudulent evasion of tax. The case is patently one where the transaction was not real. There was the most obvious "collateral defeas-

ance". The Indiana court was clearly correct in sustaining the imposition of the penalty.

The Oregon case of *Poppleton v. Yamhill County*, 8 Or. 337, is one often cited in the so-called tax avoidance cases. It is an excellent case to illustrate the very distinction we have drawn between a case where the transaction is only apparent and one where it is real. Therein, the taxpayer, to reduce taxes payable to the county of his residence, placed $13,000 of securities in the hands of one living in another county of the state nominally to secure the payment of the taxpayer's note for $1,000. If it was a pledge in "good faith" the securities were not taxable in the county of his residence. Among other facts, it appeared that "the security was greatly disproportioned to the debt," that Poppleton's affairs were such that he had no need to borrow, and particularly, that while the securities were supposed to be pledged one of the notes so deposited was delivered to him to enable him to collect payments on account thereof. From those facts the court concluded that "he had control of these notes" at all times and that the pretended pledge was in truth no pledge at all. That which he tried to make appear as a pledge was not actually a pledge. The transaction was not real.

The Oregon Supreme Court distinguished the *Poppleton* case from the case at bar on that ground. In the *Poppleton* case, so the Oregon court said, "the transaction was not genuine" and the pretended action "had never taken place" (28 Oregon Advance Sheets 103, 125-126, 86 P. (2d) 424, 433).

We believe that all the authorities cited by petitioner on this point of the effect of the motive to reduce

taxes are distinguishable upon the grounds which we have discussed in the preceding pages.

There is another distinction. Counsel at page 13 of petitioner's supplemental brief quote Cooley, on Taxation (4th Ed.), Sec. 548, in part as follows:

> "If the transaction is merely a temporary change of property from nonexempt into exempt property, made shortly before the assessment, with the intent of restoring the property to its original form after the assessment, there is such fraud as warrants taxation of the property; . . ."

This was not a case within the rule stated by the text writer, and if the authorities cited by counsel are intended to support that rule they are not in point.

Prior to the initiation of the steps taken by Dr. Hayes reviewed above, he owned intangible personal property. We will assume that Oregon had jurisdiction over that intangible property by reason of the fiction *mobilia sequuntur personam*; but no property involved in this case other than that intangible personal property originally owned by the decedent ever had an Oregon situs. The federal reserve notes had an Illinois situs. He did not take the notes from Oregon to Illinois. The notes never were in Oregon. After the transfer thereof was complete and the trust established in Chicago, the trust and all assets thereof had an Illinois situs. The intangible personal property acquired by the trustee after the gift was complete had an Illinois situs because the trustee owned the bonds, was domiciled in Illinois and was engaged in administering an irrevocable trust in Illinois. That trust property was subject to tax only by Illinois and was

beyond the jurisdiction of the state of the domicile of the settlor, who had no interest whatsover in the property, and of the state of the domicile of the beneficiaries of the trust who had the right only to receive income. *Safe Deposit & Trust Co. of Baltimore, Maryland, v. Virginia,* 280 U. S. 83, 50 S. Ct. 59, 74 L. Ed. 180. It cannot be said that there was any intent to restore or that there was in fact a restoration of the property to its original form when the facts show that the tangible personal property which was the subject of the gift and the intangible personal property later acquired by the trustee, but never owned or controlled by the decedent, never had an Oregon situs.

V. CONCLUSION

Throughout the supplemental brief of petitioner, counsel suggest that this case should be disposed of by equitable considerations. At pages 10 and 21, counsel refer to the duty of the decedent to the State of Oregon to pay taxes. We do not believe that fundamental questions of jurisdiction of a state under the Federal Constitution to impose taxes upon property beyond its limits can be disposed of by appeals based on what are claimed to be equitable considerations.

However, if the equities of this case are to be considered, they support the position of respondents rather than that of petitioner. Dr. Hayes for years before his death had done his business in Illinois through Harris Trust and Savings Bank, his agent, and for many years prior to coming to the State of Oregon to establish residence late in life he had the protection of the State of Illinois and its laws for his estate. Dr. Hayes might have handled his affairs so as to give substantially all of his property a situs for

taxation in Illinois, and if he had done so, he could not have been criticized. As a matter of fact, he established an Illinois situs for substantially less than one-half of his property and retained the balance of his estate in such a form that by application of the fiction *mobilia sequuntur personam* over one-half of his estate was subject to Oregon inheritance tax. Dr. Hayes lived in Oregon for only the last three years of his life and every equitable consideration would lead to the conclusion that Oregon, being in a position to impose an inheritance tax on property of his estate worth $637,000 (R. p. 3), has no sound ground for complaint.

But this case must be decided, not in accordance with indefinite equitable principles which either party might consider to be applicable, but rather upon the application of the principles established by this court with respect to the question of the jurisdictional power of Oregon under the Fourteenth Amendment to tax a transfer of tangible personal property situated in Illinois. The so-called equitable considerations relied on by petitioner might be to the advantage of Oregon but, by the same token, they would be to the disadvantage of the State of Illinois where the property transferred was situated.

The decisions of this court compel the conclusion, we believe, that the federal reserve notes transferred by Dr. Hayes by the trust agreement dated August 15, 1935, had a situs in Illinois at the time of the transfer and that no state other than Illinois has jurisdiction to levy an inheritance tax on that transfer, and, in particular, that Oregon, merely because Dr. Hayes was domiciled therein at the time of the transfer, has

no jurisdiction to tax the transfer. The procedure by which the tangible personal property was acquired and was given a situs in Illinois was lawful and was actually carried out. The transaction was real. There was no subterfuge. Dr. Hayes did not pretend to do one thing while in fact doing something different.

The decision of the Supreme Court of Oregon holding that Oregon does not have jurisdiction to tax the transfer should be affirmed.

Respectfully submitted,
CHARLES E. McCULLOCH,
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Counsel for Respondents.

CAREY, HART, SPENCER AND McCULLOCH,
Of Counsel for Respondents.

APPENDIX

Act of May 12, 1933, 48 St. L. 52, as amended by Act of June 5, 1933, 48 St. L. 113 (U. S. C. A. 31:462).

See reference to this statute, ante, p. 10:

"Sec. 462. Coins and currencies. All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

SUPREME COURT OF THE UNITED STATES.

No. 69.—October Term, 1939.

Walter E. Pearson, State Treasurer of the State of Oregon, Petitioner,
vs.
Ruth Hayes McGraw, and Edmund Hayes, as Executors of the Last Will and Testament of Edward Stephen Hayes, deceased, etc.

On Writ of Certiorari to the Supreme Court of the State of Oregon.

[December 4, 1939.]

Mr. Justice Douglas delivered the opinion of the Court.

Hayes, respondents' decedent, died testate in 1936 and was at the time of his death a resident of and domiciled in Oregon. In earlier years when he had resided in the middle west he placed in possession of an Illinois trust company various stocks, bonds and other intangibles, which trust company acted as his agent in collecting principal and income on those securities and in the investment of his funds. When decedent established a domicile in Oregon in 1933, he continued that arrangement with the Illinois trust company, with the result that those securities were always physically present in Illinois, never in Oregon. August 8, 1935, about six months before decedent's death, he directed the Illinois trust company to sell and liquidate sufficient of his bonds held under that agency arrangement in Illinois to procure a sum which, together with cash balances in his checking account with the trust company, would equal $450,000 and to purchase therewith, as his agent, federal reserve notes of the face amount of $450,000. Between August 8, 1935 and August 12, 1935, the Illinois trust company complied with decedent's directions[1] and prior to August 15, 1935, it pur-

[1] On the sale of bonds in the open market the trust company realized for decedent's account $176,062.01. On August 12, 1935, decedent borrowed from the trust company on a demand note $183,937.99. On that date decedent had a balance in his checking account with the trust company in excess of $90,000.

chased $450,000 of federal reserve notes and held them in Illinois as agent for decedent for a few days.

On August 15, 1935, decedent executed in Oregon a trust agreement under which the Illinois trust company was designated as trustee and by which decedent transferred to it as trustee the federal reserve notes. That trust was for the benefit of certain designated relatives and was irrevocable. Under it decedent retained no interest or power whatsoever. The trust company held those federal reserve notes under the trust agreement for about five days. Then from time to time after August 19, 1935, the Illinois trust company used the federal reserve notes, pursuant to the terms of the trust agreement, to purchase bonds and other personal property for the account of the trust.[2]

Admittedly, Oregon had jurisdiction to tax but for the alleged prohibition in the Fourteenth Amendment, for the statute in question imposed a tax on intangibles as well as tangibles which passed by deed or gift made in contemplation of the death of the grantor.[3] But the Supreme Court of Oregon held that that constitutional prohibition was present since neither the securities or cash used to purchase the federal reserve notes nor the notes themselves were ever in Oregon but always in Illinois. Though admitting that intangibles would have been taxable by Oregon under such circumstances, the court in reliance on *Blodgett* v. *Silberman*, 277 U. S. 1, concluded that the federal reserve notes were tangibles. And since decedent had retained them in Illinois for a few days prior to August 15, 1935, without any intention of bringing them to Oregon, they had acquired a so-called business situs in Illinois which con-

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With the funds so obtained the trust company purchased the $450,000 of federal reserve notes mentioned. Between August 12, 1935, and August 29, 1935, the trust company, on directions of decedent, sold in the open market additional bonds held by it in the agency account and as proceeds of those sales were received by it, it paid off the demand note. That note was entirely paid on August 29, 1935.

2 None of the property thus acquired by the trustee was ever owned by decedent; the trustee did not purchase or acquire any of the bonds or other assets which at any time constituted a part of the property held by the trustee as agent for decedent under the earlier arrangement.

3 "All property within the jurisdiction of the state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass or vest . . . by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death of the grantor, . . . to any person or persons, . . . in trust or otherwise, . . . shall be and is subject to tax at the rate hereinafter specified in section 10-603, to be paid to the treasurer of the state for the use of the state; . . ." (§ 10-601, O. C. 1930.)

stitutionally prevented Oregon from exacting a tax for their transfer.[4] And this conclusion was reached though admittedly the transfer of the notes under the agreement of August 15, 1935, was made in contemplation of death. We granted certiorari because of the importance of the constitutional question involved and of an alleged probable conflict with the principles underlying such decisions as *Curry* v. *McCanless*, 307 U. S. 357.

We disagree with the conclusion of the Supreme Court of Oregon. Oregon having jurisdiction to tax by reason of the statute was not deprived of it by the Federal Constitution.

On the facts of this case we believe that the various steps in the series must be considered as constituting but one integrated and indivisible transaction—a transfer by decedent of intangibles in contemplation of death. And we reach this result though each step in the series was real and though none was camouflaged or concealed. For basically the sale of intangibles, the acquisition of federal reserve notes, and their transfer under the agreement of August 15, 1935, were interdependent. Cf. *Groman* v. *Commissioner of Internal Revenue*, 302 U. S. 82; *Helvering* v. *Bashford*, 302 U. S. 455, 458. From decedent's point of view, completion of the series of steps was necessary for consummation of his program to utilize $450,000 of his estate to provide for certain designated members of his family.[5] Any step short of the final transfer would not have done it. The mere sale of the intangibles and the acquisition of the federal reserve notes had no functional or business significance apart from the August 15, 1935 transfer. That is emphasized here because they created no legal relations and gave rise to no vested rights interfering with decedent's continuing power of disposition. Taken as isolated transactions, they have meaning and significance only in relation to the third step, a conclusion made especially evident by the close sequence of events. Hence, it is no answer to say that because the first two steps were not irre-

[4] 86 P. (2d) 424, 87 P. (2d) 766. It seems clear that the Oregon Supreme Court reached this result by reliance on the Fourteenth Amendment and the decisions of this Court thereunder. We do not have, therefore, a case where the state court was merely construing its statute nor a case where it is not clear whether or not it was doing more than that. Cf. State Tax Commission v. Van Cott, 306 U. S. 511.

[5] This is in accord with the treatment by the Supreme Court of Oregon of "Dr. Hayes' plan", a "plan" which it felt compelled to divide into separate steps by reason of the principles of decisions of this Court dealing with business situs under the Fourteenth Amendment. Cf. Patterson v. Alabama, 294 U. S. 600.

vocable but could be recalled, the third step was not a necessary one in the series. For that is as immaterial as is the revocability of any donor's plan to make a gift in contemplation of death at any moment prior to its consummation. Admittedly decedent had such a purpose on the transfer of the notes. To hold that such purpose was not present on the sale of the intangibles would be to isolate one part of the total transaction and to give it significance and meaning utterly inconsistent with the fact that the intangibles were sold for the purpose of acquiring the notes which, in turn, were to be placed under an irrevocable trust. Therefore we need not consider the nature of federal reserve notes, for in that posture of the case their taxability as such and in isolation from the whole transaction is not in issue.

Hence to hold that there is a constitutional barrier to the tax sought to be imposed would be to make a fetish of form. It would make the principles of the decisions of this Court on the constitutional power to tax devoid of any reason or function apart from a ritual of tax avoidance. Cf. *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609; *Shotwell* v. *Moore*, 129 U. S. 590. Questions of due process are not to be treated "narrowly or pedantically, in slavery to forms or phrases." *Burnet* v. *Wells*, 289 U. S. 670, 677-78.

Accordingly, the transfer was taxable on the authority of *Curry* v. *McCanless*, *supra*, and related cases. For constitutionally the property was "within the jurisdiction of the state" of Oregon since that jurisdiction is dependent not on the physical location of the property in the state but on control over the owner.

The judgment of the Supreme Court of Oregon is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice McReynolds is of the opinion that the judgment below should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 69.—October Term, 1939.

Walter E. Pearson, State Treasurer of the State of Oregon, Petitioner,
vs.
Ruth Hayes McGraw, and Edmund Hayes, as Executors of the Last Will and Testament of Edward Stephen Hayes, deceased, etc.

On Writ of Certiorari to the Supreme Court of the State of Oregon.

[December 4, 1939.]

Mr. Justice Stone.

I concur in the judgment of reversal on the ground that nothing in the Constitution prevents taxation by Oregon of a gift by its citizen of federal reserve notes located elsewhere.

While I do not question that in the circumstances of this case a state could, if so advised, constitutionally tax its citizen for action taken for no other purpose than the evasion of its taxing statutes, no such question is, I think, presented by the record. Discussion of it seems at most to be academic and not to relieve us of the duty of deciding the only federal question which could by any possibility be said to be raised by the record, namely, whether the Constitution precludes taxation of the gift of the banknotes merely because of the physical fact that they are located without the state.

In arriving at the conclusion that the gift of federal reserve notes located outside the state was not taxable, the Supreme Court of Oregon necessarily construed the Oregon statute, which imposes a tax on gifts of "all property within the jurisdiction of the state . . . whether tangible or intangible." The court has said that the banknotes were not within the jurisdiction of the state because their situs was elsewhere, and that the acts of decedent in avoiding the tax by the acquisition of property having an extra-territorial situs were not reached for taxation by state law. If the court did anything more than rule that the statute, by its own terms, did not extend to the taxation of the gift of the notes because they were

located outside the state, it held that the Fourteenth Amendment because of that physical fact withholds, from the state, jurisdiction over the property which the taxing statute asserts.

Petitioner asks us to determine whether that holding is correct. He is entitled to have an answer. We do not rightly avoid giving the answer by saying that, by some statute other than that under review, the state could constitutionally tax its citizen for his action in avoiding the tax, by making the gift in a form of property which is by hypothesis beyond the taxing power. If the state has by its statute undertaken to lay a tax on gifts of banknotes outside the state without more—and we are without jurisdiction if it has not—no purpose is served by saying to the state that it could have reached the same result by another route, which, under its laws, does not appear to be open to it.

As I am of opinion that there is nothing in the Constitution to compel a state to treat federal reserve notes for tax purposes, as chattels were treated in *Frick* v. *Pennsylvania*, 268 U. S. 473, and as no reason has been advanced, even in *Blodgett* v. *Silberman*, 277 U. S. 1, 18, for a different view, cf. *Baldwin* v. *Missouri*, 281 U. S. 586, 591, the judgment should, I think, be reversed upon that ground rather than upon a theory of permissible legislation, of which apparently Oregon's tax laws do not avail.

Mr. Justice FRANKFURTER agrees with my views as to Oregon's power to tax these federal reserve notes, but is of opinion that the record sustains the ground taken in the Court's opinion.